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1 WEDNESDAY, FEBRUARY 3, 1999

9:32 A.M.

2 (THE FOLLOWING PROCEEDINGS WERE HELD IN
3 THE COURTROOM, IN THE PRESENCE OF THE JURY)

4 THE COURT: GOOD MORNING, EVERYBODY. AND

5 MS. CHABER, I THINK WE'RE READY TO PROCEED WITH YOUR INITIAL
6 CLOSING ARGUMENT.

7 AND WE'RE GOING TO TAKE A 15-MINUTE RECESS AT
8 SOME POINT DURING THAT CLOSING ARGUMENT. AND I'M GOING TO
9 LEAVE IT UP TO COUNSEL TO ADVISE ME WHEN EACH OF YOU THINK
10 IT'S A GOOD TIME TO HAVE THE 15-MINUTE RECESS DURING THE
11 COURSE OF YOUR ARGUMENT RATHER THAN MY INTERRUPTING YOU.

12 MS. CHABER, YOU MAY PROCEED.

13 MS. CHABER: THANK YOU.

14 MAY IT PLEASE THE COURT, COUNSEL, PATRICIA,
15 LADIES AND GENTLEMEN OF THE JURY. AT THE BEGINNING OF THIS
16 CASE, I TOLD YOU THAT THIS WAS A CASE ABOUT A PACK OF LIES.
17 A PACK OF LIES THAT WAS TOLD BY THIS DEFENDANT, THAT HAS
18 BEEN TOLD TO THE AMERICAN PUBLIC, THAT WAS TOLD TO PATRICIA
19 HENLEY, AND THAT HAS BEEN TOLD TO YOU IN THE COURTROOM.
20 THERE IS ONLY ONE REASON AND ONE REASON ONLY THAT THE
21 DEFENDANT HAS TOLD THESE LIES AND THAT IS FOR PROFITS.

22 PHILIP MORRIS EXERCISED THEIR FREE CHOICE TO
23 CHOOSE PROFITS OVER THE HEALTH AND SAFETY OF PEOPLE. THAT
24 WAS THEIR CHOICE. AND IT IS TIME NOW FOR THEM TO TAKE
25 PERSONAL RESPONSIBILITY FOR THE CHOICE THAT THEY MADE.

26 WE HAVE TOLD YOU THE TRUTH. WE HAVE BROUGHT YOU
27 WITNESSES TO TELL YOU THE TRUTH, PEOPLE WITH IMPECCABLE
28 CREDENTIALS, PEOPLE WHO HAVE WRITTEN SURGEON GENERAL'S

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1 REPORTS, PEOPLE WHO HAVE WRITTEN TEXTBOOKS, PEOPLE WHO THE
2 EXPERTS GO TO.

3 BUT NO MATTER WHAT EVIDENCE WAS PRESENTED, THE
4 DEFENDANTS HAVE DONE ONE THING AND ONE THING ONLY, DENY,
5 DENY, DENY. AND THAT IS A STRATEGY THAT HAS BEEN GOING ON
6 FOREVER. HERE IS WHAT IS UNDENIABLE. (REFERRING TO SCREEN)
7 400,000 -- WE EVEN HEARD THE NUMBER 450,000 PEOPLE DIE EVERY
8 YEAR FROM CIGARETTE-RELATED DISEASE. THE EQUIVALENT OF
9 THREE FULLY LOADED JUMBO JETS CRASHING EVERY DAY.

10 COULD YOU IMAGINE THE NEWS HEADLINES IF THREE
11 JUMBO JETS CRASH? AND YET, THAT IS WHAT HAPPENS EVERY DAY
12 IN THIS COUNTRY. TWO OUT OF FIVE PEOPLE WILL DIE FROM A
13 SMOKING-RELATED DISEASE. THAT IS RUSSIAN ROULETTE, ONLY
14 INSTEAD OF ONE BULLET IN THE CHAMBER, THERE'S TWO.

15 PHILIP MORRIS IS THE NO. 1 CIGARETTE MANUFACTURER
16 IN THE UNITED STATES. AND AS WE HEARD FROM THEIR OWN
17 WITNESSES, MARLBORO LIGHTS AND MARLBORO REDS ARE THE NO. 1
18 AND THE NO. 2 CIGARETTES SOLD. NOT JUST TO ADULTS, LADIES
19 AND GENTLEMEN, BUT TO CHILDREN. MARLBOROS ARE THE MOST
20 POPULAR CIGARETTE WITH CHILDREN.

21 AND CHILDREN ARE WHO START SMOKING. 30-YEAR-OLDS
22 DON'T START SMOKING. 40-YEARS-OLD DON'T START SMOKING.
23 TEENAGERS START SMOKING. THAT IS WHO THE MARKET IS. THAT
24 IS WHO THEIR ADVERTISING IS GEARED TO, BECAUSE WITHOUT THOSE
25 STARTER SMOKERS, THERE IS NO BUSINESS. PEOPLE WHO ARE
26 ALREADY SMOKING GET SICK AND THEY DIE. AND THEY NEED TO BE
27 REPLACED. AND WHO ARE THEY REPLACED WITH? THEY ARE
28 REPLACED WITH THE NEXT GENERATION OF CHILDREN.

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1 NOW, PATRICIA WAS A GOOD AND LOYAL CUSTOMER OF
2 PHILIP MORRIS. THEY WERE ONLY TOO HAPPY TO ACCEPT HER MONEY

3 WHEN SHE WAS BUYING HER CIGARETTES. THEY WERE ONLY TOO
4 HAPPY TO ENCOURAGE HER TO CONTINUE TO SMOKE, TO CONTINUE TO
5 BUY CIGARETTES. AND NOW THAT SHE IS SICK BECAUSE OF THEIR
6 PRODUCT, THEY WANT TO ABANDON HER. THEY WANT TO SAY:
7 "YOU'RE ON YOUR OWN NOW, ALTHOUGH WE DID THIS TOGETHER."
8 THEY NEEDED PATRICIA. THEY NEEDED OTHER PEOPLE TO BUY THEIR
9 CIGARETTES. THEY WANT NO RESPONSIBILITY NOW.

10 PATRICIA, YOU HEARD HER TESTIFY. SHE'S OWNED UP
11 TO HER RESPONSIBILITY. SHE HAS OWNED UP TO HER
12 RESPONSIBILITY AND SHE WILL PAY. AND SHE WILL PAY DEARLY.
13 SHE WILL PAY WITH 30 YEARS OF HER LIFE. 30 YEARS THAT SHE
14 COULD SPEND WITH CHILDREN AND GRANDCHILDREN. 30 YEARS THAT SHE
15 COULD TRY TO BECOME A SINGER. 30 YEARS TO FULFILL
16 DREAMS. THOSE ARE GONE NOW. THAT'S WHAT SHE'S PAYING
17 WITH. ALL WE'RE GOING TO ASK FROM PHILIP MORRIS IS MONEY.
18 SOMETHING THAT THEY KNOW A LOT ABOUT. THE WHOLE REASON THAT
19 THEY'RE IN BUSINESS.

20 EVERY MANUFACTURER IN THIS COUNTRY STANDS BEHIND
21 ITS PRODUCT. WHEN YOU PUT YOUR NAME ON A PRODUCT, YOU STAND
22 BEHIND IT AND YOU SAY: "THIS PRODUCT IS HERE TO BE USED.
23 THIS PRODUCT ISN'T GOING TO KILL YOU." WE WANT PHILIP
24 MORRIS TO STAND BEHIND THEIR PRODUCT.

25 NOW, I KNOW IT MAY HAVE SEEMED AT TIMES LIKE
26 PATRICIA HENLEY WAS ON TRIAL, BUT SHE IS NOT ON TRIAL. YOU
27 WILL FIND NO PLACE ON THE VERDICT FORM WHERE IT SAYS
28 "PATRICIA HENLEY, NEGLIGENT; RESPONSIBLE." THERE'S NO

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1 PLACE THERE FOR THAT. THAT IS NOT THE QUESTION YOU ARE
2 ANSWERING.

3 THAT IS NOT WHAT THIS TRIAL IS ABOUT. THIS TRIAL
4 IS ABOUT WHETHER OR NOT THIS DEFENDANT IS GOING TO SHARE IN
5 THE RESPONSIBILITY FOR THE HARM THAT THEY HAVE CAUSED
6 PATRICIA.

7 NOW, PATRICIA HAS DONE NOTHING ILLEGAL. SHE'S
8 DONE NOTHING IMMORAL. SHE'S DONE NOTHING WRONG. SHE DID
9 EXACTLY WHAT PHILIP MORRIS WANTED HER TO DO, WHICH WAS TO
10 START SMOKING WHEN SHE WAS A TEENAGER AND TO KEEP SMOKING.
11 THAT IS THEIR BUSINESS. AND NOW THAT THE PRODUCT HAS HARMED
12 HER, IT'S TIME FOR THEM TO COMPENSATE.

13 AT THE END OF TODAY, WE'RE GOING TO ASK YOU TO
14 PUT YOUR COLLECTIVE WISDOMS TOGETHER AND TO RENDER A FAIR
15 AND JUST VERDICT. WE'RE CONFIDENT THAT YOU CAN DO SO.
16 YOU'VE BEEN AN INCREDIBLY ATTENTIVE JURY. YOU'VE TAKEN
17 NOTES THROUGHOUT, PUT UP WITH A LOT OF CHANGES IN SCHEDULE
18 AND A LOT OF INCONVENIENCE TO YOUR LIVES. AND PATRICIA AND
19 I THANK YOU VERY MUCH FOR THAT.

20 AND WE KNOW THAT WHEN YOU GO BACK INTO THE JURY
21 ROOM AND YOU START DELIBERATING AND YOU START TALKING TO
22 EACH OTHER, THAT YOU WILL FOLLOW THE LAW AND THAT YOU WILL
23 APPLY THE FACTS THAT YOU'VE HEARD HERE. AND WHEN YOU DO AND
24 YOU APPLY THE TRUTH, YOU WILL COME OUT WITH A VERDICT IN
25 FAVOR OF PATRICIA HENLEY AND AGAINST PHILIP MORRIS.

26 NOW, THIS CASE IS REALLY VERY SIMPLE. ALTHOUGH
27 I'VE GOT TO TELL YOU WHEN YOU SEE THIS VERDICT FORM THAT
28 YOU'RE GOING TO GET, THAT YOU'RE GOING TO HAVE TO ANSWER,

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1 YOU'RE NOT GOING TO THINK SO. BUT IT REALLY IS A SIMPLE
2 CASE.

3 AND WHAT I'D LIKE TO DO IS TAKE YOU THROUGH EACH
4 AND EVERY ONE OF THE QUESTIONS THAT YOU'RE GOING TO BE ASKED
5 AND TALK ABOUT THE LAW AND TALK ABOUT THE FACTS, BUT WE'D BE

6 HERE FOR ANOTHER THREE WEEKS AND I HAVE UNTIL 12:15. SO I'M
7 NOT GOING TO DO THAT, NOR COULD I.

8 BUT WHAT I WILL DO IS I WILL SHOW YOU SOME OF THE
9 QUESTIONS AND TAKE YOU THROUGH SOME OF THEM AND THEN LEAVE
10 IT TO YOUR GOOD SENSE AS TO HOW TO FOLLOW THE REST OF THE
11 QUESTIONNAIRE AND HOW TO RETURN YOUR VERDICT.

12 NOW, BEFORE I DO THAT AND BEFORE I GET TO THE
13 VERDICT FORM, I NEED TO TALK TO YOU A LITTLE BIT ABOUT THE
14 BURDEN OF PROOF. THE BURDEN OF PROOF IN A CIVIL CASE IS
15 WHAT'S CALLED THE PREPONDERANCE OF THE EVIDENCE. IT SOUNDS
16 VERY COMPLICATED, BUT IT'S REALLY VERY SIMPLE.

17 AT THE START OF A TRIAL, THINK ABOUT THE SCALES
18 OF JUSTICE. THE SCALES OF JUSTICE ARE EVEN. AND AS THE
19 TRIAL --

20 MR. OHLEMAYER: YOUR HONOR, I DON'T MEAN TO
21 INTERRUPT. I OBJECT TO THAT AS BEING AN ARGUMENT OF THE
22 LAW, A LEGAL ARGUMENT.

23 THE COURT: I THINK WHAT YOU NEED TO DO ON THE
24 INSTRUCTIONS IS STICK PRETTY CLOSE TO THE LANGUAGE THAT I'VE
25 GIVEN TO THE JURY.

26 MS. CHABER: I WILL BE HAPPY TO GIVE THEM THE
27 DIRECT LANGUAGE, BUT I CAN'T COMMENT ON IT?

28 THE COURT: WELL, WHAT I SUGGEST YOU DO, I HAVE

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1 NO PROBLEM WITH YOUR GIVING THEM THE DIRECT LANGUAGE. IF
2 YOUR ARGUMENT IS RIGHT ON POINT WITH THE DIRECT LANGUAGE,
3 THAT'S OKAY ALSO.

4 ALTERNATE JUROR NO. 3: YOUR HONOR, I'M NOT
5 GOING TO BE ABLE TO SEE THE SCREEN.

6 MS. CHABER: BECAUSE OF THIS (REFERRING TO
7 BOARD).

8 THE COURT: THANK YOU.

9 ALTERNATE JUROR NO. 3: AND THAT (REFERRING TO
10 TELEVISION MONITOR).

11 THE COURT: IF YOU ARE LOOKING FOR THE
12 DEFINITION, MS. CHABER --

13 MS. CHABER: I HAVE IT.

14 THE COURT: -- IT'S ON PAGE 20.

15 MS. CHABER: I HAVE IT, YOUR HONOR.

16 THE COURT: OKAY.

17 MS. CHABER: I'M TRYING TO MAKE IT VISIBLE.

18 MAYBE WE CAN GET THE LIGHTS. I HOPE THIS IS READABLE.

19 "'PREPONDERANCE OF THE EVIDENCE' MEANS EVIDENCE
20 THAT HAS MORE CONVINCING FORCE THAN THAT OPPOSED
21 TO IT. IF THE EVIDENCE IS SO EVENLY BALANCED
22 THAT YOU ARE UNABLE TO SAY THAT THE EVIDENCE ON
23 EITHER SIDE OF AN ISSUE PREPONDERATES, YOUR
24 FINDING ON THAT ISSUE MUST BE AGAINST THE PARTY
25 WHO HAD THE BURDEN OF PROVING IT."

26 THE PLAINTIFF, WE, PATRICIA, WE BEAR THE BURDEN
27 OF PROOF ON THESE ISSUES. AND AS THE EVIDENCE HAS COME IN,
28 AND AS THE EVIDENCE HAS BEEN PUT ON THE SCALES, THE SCALES

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1 HAVE TIPPED IN THE FAVOR OF THE PLAINTIFF ON THE ISSUES THAT
2 YOU ARE GOING TO HAVE TO DECIDE.

3 YOU CAN WALK OUT OF THIS COURTROOM HAVING FOUND
4 FOR THE PLAINTIFF WITHOUT BEING 100 PERCENT CERTAIN, WITHOUT
5 BELIEVING SOMETHING BEYOND A REASONABLE DOUBT. THAT IS NOT
6 THE STANDARD THAT IS APPLIED HERE. PREPONDERANCE OF THE
7 EVIDENCE, THE TIPPING OF THE SCALES.

8 NOW, BEFORE I GET TO THE CLAIMS AND BEFORE I GET

9 TO THE VERDICT FORM, I WANT TO DEAL WITH A BOGUS ISSUE. AND
10 THAT ISSUE IS DOES PATRICIA HENLEY HAVE LUNG CANCER? THE
11 ANSWER TO THAT QUESTION IS VERY SIMPLE. PATRICIA HENLEY
12 CAME INTO THIS COURT DIAGNOSED WITH LUNG CANCER, AND SHE
13 WILL LEAVE THIS COURT DIAGNOSED WITH LUNG CANCER.

14 WE BROUGHT YOU VERY QUALIFIED EXPERTS TO TALK
15 ABOUT THAT, TO TALK ABOUT THE REASONS FOR THAT, TO TALK
16 ABOUT WHY IT IS THAT THE PEOPLE WHO TREATED HER BELIEVE
17 THAT, MADE THAT DIAGNOSIS, AND THE DEFENDANTS BROUGHT YOU
18 SOME EXPERTS.

19 AND IT'S YOUR JOB NOT TO BE DOCTORS. I KNOW YOU
20 LOOKED AT THE X-RAYS AND THE CT SCANS SO MANY TIMES THAT BY
21 NOW YOU PROBABLY CAN READ THEM BETTER THAN MOST. BUT YOU
22 ARE NOT DOCTORS. AND YOU ARE NOT BEING ASKED TO MAKE THAT
23 DECISION. WHAT YOUR JOB IS IS TO EVALUATE THE EXPERT
24 OPINIONS, THE SCIENTIFIC AND MEDICAL OPINIONS AND TO COMPARE
25 AND TO CONTRAST THEM.

26 AND I WANT YOU TO KEEP ONE THING IN MIND WHEN YOU
27 THINK ABOUT THE EXPERTS THAT THE DEFENDANT BROUGHT YOU. I
28 WANT YOU TO THINK ABOUT WHETHER THEY BELONG TO THE FLAT

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1 EARTH SOCIETY OR THE ROUND EARTH SOCIETY. WHETHER THEY CAN
2 ANSWER THE VERY SIMPLE QUESTION: DOES CIGARETTE SMOKING
3 CAUSE LUNG CANCER? WHETHER THEY COULD ANSWER THAT SIMPLE
4 QUESTION. IT'S AN EASY QUESTION.

5 ANY DOCTOR IN THIS COUNTRY CAN ANSWER THAT, AND
6 THE ANSWER TO THAT QUESTION IS YES. BUT YOU DID NOT HEAR
7 THAT. DR. WARREN AND DR. HENSLEY, YOU HEARD THE SAME
8 RESPONSE FROM THEM. "WELL, WE CAN'T REALLY SAY 'CAUSE.' WE
9 DON'T REALLY KNOW WHAT 'CAUSE' MEANS. IT COULD MEAN A LOT
10 OF THINGS. MAYBE IT'S A RISK. MAYBE IT'S NOT A RISK.
11 MAYBE THERE ARE OTHER RISKS."

12 WE'RE HERE IN 1999, LADIES AND GENTLEMEN.
13 CIGARETTE SMOKING CAUSES LUNG CANCER. TAKE THOSE ANSWERS
14 INTO CONSIDERATION WHEN YOU CONSIDER THE OPINIONS OF THOSE
15 DOCTORS. AND AS YOU LEARNED THROUGH THIS TRIAL, EXPERTS GET
16 PAID. THEY GET PAID ON BOTH SIDES. MOST DOCTORS WILL NOT
17 COME TO A COURTROOM, GIVE UP THEIR PRACTICE, GIVE UP WHAT
18 THEY'RE DOING AND NOT GET PAID. IT'S PRETTY STANDARD. AND
19 IN THE PRACTICE OF LAW, IF YOU HAVE AN EXPERT, THEY'RE GOING
20 TO GET PAID.

21 SO IF YOU FIND THAT THE EXPERTS SOMEHOW BALANCED
22 EACH OTHER OUT, THEY'RE ALL BEING PAID. IF YOU THINK THEIR
23 OPINIONS WERE GOOD IN EITHER DIRECTION, I SAY THIS TO YOU:
24 THROW OUT ALL THE EXPERT OPINIONS ON THIS ISSUE. AND WHAT
25 DOES THAT LEAVE YOU WITH? THAT LEAVES YOU WITH DR. MENA AND
26 THAT LEAVES YOU WITH DR. HAGEN. THAT LEAVES YOU WITH THE
27 PEOPLE WHO ARE GOING TO -- WHEN THIS TRIAL IS OVER AND
28 YOU'VE GONE BACK TO YOUR LIVES, THE PEOPLE WHO ARE STILL

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1 GOING TO BE DEALING WITH PATRICIA. THE PEOPLE WHO ARE GOING
2 TO BE TREATING HER.

3 AND DR. MENA CAME HERE ON HIS OWN TIME WITHOUT
4 CHARGE. AND HE CAME FOR A REASON. AND THAT IS BECAUSE IT
5 IS CRYSTAL CLEAR. PATRICIA HAS LUNG CANCER. HE MADE THAT
6 INDEPENDENT DECISION. IT'S A LIFE-AND-DEATH DECISION. IT'S
7 NOT ACADEMIC. LIKE THE DEFENDANTS SAID, IT'S NOT AN
8 ACADEMIC DECISION AT ALL. AND HE DID NOT MAKE IT LIGHTLY.
9 AND HE DID NOT COME HERE LIGHTLY TO TELL YOU THAT.

10 AND DR. HAGEN CAME HERE AS WELL. AND DR. HAGEN
11 REVIEWED THE X-RAYS, REVIEWED THE CT SCANS. AND HE IS THE

12 ONE WHO DID THE SURGERY. SO WHILE THE DEFENDANT'S EXPERTS
13 CAN POSTULATE WHAT WAS IN DR. HAGEN'S MIND, YOU HEARD FROM
14 DR. HAGEN HIMSELF. LUNG CANCER. LUNG CANCER. THE EVIDENCE
15 IS CRYSTAL CLEAR.

16 BUT YOU DON'T EVEN NEED TO REACH A CRYSTAL-CLEAR,
17 100-PERCENT BELIEF IN THAT. THE WAY CAUSE IS DETERMINED,
18 THE WAY CAUSE IS EVALUATED IN A TRIAL IS AN INSTRUCTION THAT
19 THE JURY -- EXCUSE ME -- THAT THE JUDGE READ TO YOU
20 YESTERDAY. AND ACTUALLY, THERE ARE TWO INSTRUCTIONS.

21 "THE LAW DEFINES CAUSE IN ITS OWN PARTICULAR
22 WAY. A CAUSE OF INJURY, DAMAGE, LOSS OR HARM IS
23 SOMETHING THAT IS A SUBSTANTIAL FACTOR IN
24 BRINGING ABOUT AN INJURY, DAMAGE, LOSS OR HARM."

25 70 TO 120-PACK YEARS OF SMOKING IS MORE THAN A
26 SUBSTANTIAL FACTOR. "SUBSTANTIAL FACTOR" IS SOMETHING
27 THAT'S MORE THAN TRIVIAL. BUT EVEN WERE YOU TO BELIEVE THAT
28 THERE MAY BE SOME OTHER FACTORS, EVEN IF YOU ARE TO BELIEVE

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1 THE AIR POLLUTION OR THE DIESEL FUEL OR WHATEVER OTHER
2 THEORIES WERE PROPOUNDED BY THE DEFENDANTS, THE CAUSE
3 INSTRUCTION SAYS "A SUBSTANTIAL FACTOR" FOR ONE REASON AND
4 ONE REASON ONLY. BECAUSE THERE CAN BE MORE THAN ONE
5 FACTOR. THERE CAN BE MORE THAN ONE CAUSE OF AN INJURY.

6 SO EVEN IF YOU THINK THAT THERE'S SOMETHING ELSE
7 THERE, PATRICIA'S LUNG CANCER WAS CAUSED BY CIGARETTE
8 SMOKING, BY SMOKING MARLBORO CIGARETTES MADE BY PHILIP
9 MORRIS. AND EVEN TO THE EXTENT THAT SHE DID SOMETHING
10 WRONG, IT IS NO DEFENSE THAT THE NEGLIGENT OR WRONGFUL
11 CONDUCT OF A PERSON NOT JOINED AS A PARTY WAS ALSO THE CAUSE
12 OF THE INJURY.

13 NOW, THERE ARE A NUMBER OF DIFFERENT LEGAL CLAIMS
14 AND I SHOWED YOU THIS VERDICT FORM. IT IS RATHER LONG AND
15 IT'S DIVIDED UP. IT'S DIVIDED UP, AS YOU WILL SEE, INTO
16 DIFFERENT VERDICTS. AND I'LL COME BACK TO THIS. BUT JUST
17 SO THAT YOU CAN SEE, THAT THERE'S VERDICTS ON DIFFERENT
18 CLAIMS. AND YOU GO THROUGH EACH OF THESE.

19 AND WHEN YOU'VE GONE THROUGH EACH OF THESE,
20 DEPENDING ON WHAT YOUR VERDICTS ARE, YOU'RE THEN ASKED WHAT
21 THE TOTAL AMOUNT OF DAMAGES, COMPENSATORY DAMAGES SUSTAINED
22 BY PATRICIA ARE. AND THEN YOU'LL BE ASKED ANOTHER QUESTION,
23 AND THAT QUESTION HAS TO DO WITH MALICE, FRAUD, OR
24 OPPRESSION. AND IT HAS TO DO WITH THE DEFENDANT'S CONDUCT.

25 WE'LL TALK ABOUT THAT IN A FEW MINUTES, BECAUSE
26 RIGHT NOW I WANT TO TALK ABOUT THE DEFECTIVE PRODUCT
27 CLAIMS. WHEN YOU TALK ABOUT A DEFECTIVE PRODUCT, YOUR FOCUS
28 IS NOT ON WHAT THE MANUFACTURER DID, KNEW, SHOULD HAVE DONE,

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1 IT'S ON THE PRODUCT ITSELF. THAT'S WHERE THE FOCUS IS. AND
2 IT'S A VERY SIMPLE TEST AND PARTS OF THIS TEST ARE VERY EASY
3 TO ANSWER. I CUT OFF ONE AND TWO (REFERRING TO SCREEN).

4 THE DEFENDANT WAS A MANUFACTURER OF A PRODUCT,
5 NAMELY MARLBORO CIGARETTES. I DON'T THINK THERE'S ANY
6 QUESTION ABOUT THAT. BUT YOU'LL SEE THAT THE MAIN CLAIM AND
7 THE LANGUAGE THAT IS USED IS:

8 "A PRODUCT IS DEFECTIVE IN DESIGN IF IT FAILS TO
9 PERFORM AS SAFELY AS AN ORDINARY CONSUMER WOULD
10 EXPECT WHEN USED IN AN INTENDED OR REASONABLY
11 FORESEEABLE MANNER."

12 NOW, THERE ARE CERTAIN PARTS OF THIS THAT WE CAN
13 DO AWAY WITH IMMEDIATELY. THE SMOKING OF CIGARETTES IS
14 CERTAINLY THE INTENDED OR REASONABLY FORESEEABLE MANNER OF

15 USE OF THAT PRODUCT. IT'S EXACTLY WHAT THEY'RE DESIGNED
16 FOR. THEY'RE DESIGNED TO BE PICKED UP. THEY'RE DESIGNED TO
17 BE SMOKED. AND THAT'S WHAT PATRICIA DID. SO THAT'S SORT OF
18 A NONISSUE, ALTHOUGH YOU'LL BE ASKED THAT ON THE VERDICT
19 FORM IN THE SAME FASHION.

20 "QUESTION NO. 1. "DID DEFENDANT'S PRODUCT FAIL
21 TO PERFORM AS SAFELY AS AN ORDINARY CONSUMER OF
22 THAT PRODUCT WOULD EXPECT WHEN USED IN AN
23 INTENDED OR REASONABLY FORESEEABLE MANNER?"
24 AND THE ANSWER TO THAT QUESTION IS YES, IT DID.
25 AND ONE OF THE THINGS YOU NEED TO THINK ABOUT AND YOU NEED
26 TO FOCUS ON IS NOT NECESSARILY STANDING HERE IN 1999, BUT
27 GOING BACK IN TIME TO DETERMINE WHAT WAS THE ORDINARY
28 CONSUMER THINKING ABOUT?

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1 AND THE OPERATIVE WORD HERE IS NOT "DID IT
2 PERFORM," BECAUSE THE CIGARETTES WORKED. YOU LIGHT THEM.
3 THEY BURN SOMETHING. YOU INHALE THE SMOKE. THEY WORK. BUT
4 "SAFELY." THAT'S THE OPERATIVE WORD, "SAFELY." DID THEY
5 PERFORM AS SAFELY AS THE ORDINARY CONSUMER WOULD EXPECT?

6 WE KNOW THAT THE PRODUCTS DIDN'T PERFORM SAFELY.
7 WE KNOW THAT, BECAUSE PATRICIA HAS LUNG CANCER. WE KNOW
8 THAT, BECAUSE 180,000 PEOPLE EVERY YEAR DIE FROM LUNG
9 CANCER. WE KNOW THAT BECAUSE THERE'S HEART DISEASE, OTHER
10 TYPES OF CANCERS. SO WE KNOW THAT THE PRODUCT DID NOT
11 PERFORM SAFELY.

12 SO THE ONLY ISSUE THEN IS "AS SAFELY AS THE
13 ORDINARY CONSUMER WOULD EXPECT." SO WHAT IS THE ORDINARY
14 CONSUMER'S EXPECTATION? WELL, IT'S SIMPLE. THE DEFENDANTS
15 THEMSELVES DEFINED THAT EXPECTATION. THE CONSUMER'S
16 EXPECTATION OF HOW SAFE A PRODUCT IS CAN NEVER EXCEED THAT
17 OF THE MANUFACTURER. THEY'RE THE EXPERTS. PATRICIA AND
18 OTHER PEOPLE WHO SMOKE, THEY'RE NOT THE EXPERTS. THEY DON'T
19 GO TO THE MEDICAL LIBRARIES. THEY DON'T HAVE SCIENTISTS ON
20 STAFF. THEY HAVE A RIGHT TO RELY ON WHAT THE MAKER OF THE
21 PRODUCT SAYS.

22 AND PHILIP MORRIS SAYS "SMOKING THESE CIGARETTES
23 DOES NOT CAUSE LUNG CANCER." PATRICIA AND THE ORDINARY
24 CONSUMER HAD A RIGHT TO BELIEVE THAT. NOW, WE KNOW NOW THAT
25 THAT'S WRONG. AND YOU HEARD THOSE SAME STATEMENTS HERE IN
26 THE COURTROOM. "WE DON'T BELIEVE IT," PHILIP MORRIS SAYS.
27 "WE DON'T BELIEVE THAT OUR PRODUCTS ARE DANGEROUS. BUT FOR
28 GOSH SAKES, KING JAMES SAID THEY WERE BAD, SO THEREFORE,

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1 YOUR CLIENT IS SUPPOSED TO KNOW THEY'RE BAD. THE ORDINARY
2 CONSUMER KNOWS THEY'RE BAD, EVEN THOUGH WE CLAIM THAT
3 SCIENCE HAS NOT PROVED IT YET. EVEN THOUGH WE SATURATED THE
4 MEDIA WITH STORIES SAYING THERE IS A CONTROVERSY."

5 AND THE ORDINARY CONSUMER IN THE 1950S, IN THE
6 1960S, IN THE 1970S, THE ORDINARY CONSUMER BELIEVED THAT
7 THERE WAS A CONTROVERSY. THERE WERE TWO SIDES OF THE
8 STORY. SOME PEOPLE WERE SAYING IT WAS BAD. OTHER PEOPLE
9 WERE SAYING IT WASN'T BAD. AND CERTAINLY THEY JUST KEPT
10 SELLING THEM. SO HOW BAD COULD THEY BE? THEY KEPT
11 ADVERTISING THEM. SO HOW BAD COULD THEY BE?

12 AND IT'S NOT UNTIL THE 1980S WHERE FINALLY,
13 FINALLY THERE'S SOME MONEY IN THE PUBLIC HEALTH COMMUNITY
14 AND THEY'RE STARTING TO PUT ON VERY GRAPHIC ADVERTISEMENTS,
15 PUBLIC HEALTH BULLETINS ON TV. AND THE ORDINARY CONSUMER
16 HAS TO THINK: "WELL, THIS IS GETTING PRETTY SERIOUS."
17 SO WHAT DID PATRICIA DO? SHE CALLED PHILIP

18 MORRIS AND SAID: "AM I SUPPOSED TO BELIEVE THIS? THESE
19 PEOPLE ARE SAYING IT'S BAD."
20 AND WHAT DOES PHILIP MORRIS TELL HER? "NO. OUR
21 SCIENTISTS ARE LOOKING INTO IT. IT'S STILL A CONTROVERSY.
22 CIGARETTE SMOKING HAS NOT BEEN PROVED TO CAUSE LUNG CANCER.
23 BUT IF YOU'RE WORRIED, SWITCH TO LOW-TAR CIGARETTES. SWITCH
24 TO THE LIGHTS."

25 AND THAT'S WHAT PATRICIA DID. SHE SWITCHED TO
26 THE LIGHT CIGARETTES. AND SHE SMOKED MARLBORO LIGHTS. THE
27 ORDINARY CONSUMER OF A CIGARETTE DOESN'T KNOW THAT THERE ARE
28 A LIST OF HUNDREDS OF ADDITIVES.

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1 NOW, THE DEFENDANTS -- AND THE LIST IS IN
2 EVIDENCE. YOU'LL SEE IN EVERY ONE OF THE SUBSTANCES THEY
3 LIST, THEY SAY: "WELL, THIS IS AN APPROVED SUBSTANCE FOR
4 PUTTING IN FOOD OR FOR PUTTING SOMEWHERE ELSE." BUT YOU
5 HEARD THE TESTIMONY. YOU HEARD THE TESTIMONY FROM TWO
6 DIFFERENT PEOPLE WHO WORKED ON SURGEON GENERAL'S REPORTS WHO
7 WERE SCIENTIFIC EDITORS, EDITED THE WHOLE VOLUMES. AND THEY
8 SAID "INGESTING SOMETHING AND HAVING IT BE SAFE IS VERY
9 DIFFERENT THAN BURNING SOMETHING AND WHATEVER BYPRODUCTS GET
10 CREATED IN THAT BURNING AND INHALING IT TO THE DEEPEST
11 RECESSES OF YOUR LUNGS."

12 AND YOU KNOW WHAT? DO YOU THINK THAT THE
13 DEFENDANTS WENT AND TESTED TO SEE WHETHER OR NOT THESE
14 ADDITIVES WERE SAFE? DO YOU THINK THAT THEY TOLD THE HEALTH
15 COMMUNITY? YOU HEARD DR. DAVIS. "YES, THEY PROVIDED US
16 WITH THIS LIST. WE DON'T KNOW WHAT'S IN WHICH CIGARETTE.
17 WE DON'T KNOW WHAT QUANTITIES. WE DON'T KNOW WHAT THE
18 INTERACTION OF THESE THINGS TOGETHER WOULD BE."

19 BUT THE ORDINARY CONSUMER IS SUPPOSED TO KNOW
20 MORE THAN THAT. THEY'VE SAID IT WAS SAFE. AND THE ORDINARY
21 CONSUMER AND MANY OF YOU BEFORE YOU WALKED INTO THIS
22 COURTROOM DIDN'T KNOW THAT THERE WERE 4,000 CARCINOGENS THAT
23 CAME OUT OF SMOKE, DIDN'T KNOW ABOUT NITROSAMINES,
24 POLYAROMATIC HYDROCARBONS, DIDN'T KNOW THAT THERE WERE
25 CANCER-CAUSING SUBSTANCES, DIDN'T KNOW THAT TWO OUT OF FIVE
26 PEOPLE DIE FROM SMOKING, DIDN'T KNOW THE MAGNITUDE OF THE
27 HARM CAUSED.

28 AND SINCE THEY DENY THE MAGNITUDE OF THE HARM

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1 CAUSED, YOU CANNOT BLAME PATRICIA FOR BELIEVING THEM.
2 THAT'S WHAT THEY WANTED HER TO DO. THE ORDINARY CONSUMER
3 LOOKS AT A PRODUCT AND THINKS: "IF THERE'S SOMETHING WRONG
4 WITH THIS PRODUCT, ISN'T THE MANUFACTURER GOING TO TELL ME?"

5 NOW, YOU CAN SAY: "WELL, THERE WERE WARNINGS ON
6 THE PACKAGES." BUT WHEN PATRICIA STARTED SMOKING AT AGE 15
7 IN 1961, THERE WAS NOTHING ON THE PACKAGE. THERE WAS NO
8 WARNING.

9 NOW, IF THERE WAS A PRODUCT THAT HAD 4,000
10 CARCINOGENS THAT CAME OUT OF IT WHEN YOU USED IT LIKE IT WAS
11 SUPPOSED TO BE USED, YOU'D EXPECT TO SEE A SKULL AND
12 CROSSBONES ON IT (INDICATING). YOU'D EXPECT TO SEE THE WORD
13 "POISON" ON IT. BUT THERE WAS NOTHING ON IT IN 1961,
14 NOTHING, NOTHING, NOTHING. AND THERE WAS NOTHING IN THEIR
15 ADVERTISING AND THERE WAS NOTHING ON THE BILLBOARDS AND
16 THERE WAS NOTHING IN THE STORES. THERE WERE JUST
17 CIGARETTES.

18 AND 70 PERCENT OF THE POPULATION SMOKED.
19 EVERYBODY WAS SMOKING. IT'S REALLY HARD TO IMAGINE THAT NOW
20 HERE, ESPECIALLY WHERE WE LIVE. THINK ABOUT IT. YOU CAN'T

21 GO INTO A BAR NOW AND HAVE A CIGARETTE, RESTAURANTS, PUBLIC
22 BUILDINGS, YOUR OFFICES. BUT IN 1961, WHEN PATRICIA STARTED
23 SMOKING, YOU COULD SMOKE ANYWHERE AND EVERYWHERE. AND
24 EVERYONE DID. NOW, MAYBE THERE WERE SOME PLACES LIKE IN THE
25 SCHOOLS, LIKE IN THE CHURCHES, AND LIKE IN THE MOVIE
26 THEATER, THOUGH OF COURSE YOU COULD GO OUT TO THE LOBBY AND
27 HAVE A CIGARETTE.

28 AND THE FIRST TIME ANYTHING APPEARED ON A PACK OF

0016
1 CIGARETTES, IT DIDN'T SAY: "WARNING: THIS STUFF WILL KILL
2 YOU." IT DIDN'T SAY: "THIS HAS THOUSANDS OF CANCER-CAUSING
3 SUBSTANCES." IT DIDN'T SAY: "THIS IS A POISON." IT SAID,
4 IN VERY SMALL, INCONSPICUOUS LANGUAGE: "CAUTION. SMOKING
5 MAY BE DANGEROUS TO YOUR HEALTH." AND THE OPERATIVE WORD
6 THERE IS "MAY."

7 THAT CAUTION LABEL WAS TOTALLY INADEQUATE. IT
8 DIDN'T TELL ANYONE ANYTHING. IT WOULDN'T BE ENOUGH TO
9 CHANGE ANYONE'S HABITS BASED ON THAT. AND IT CERTAINLY IS
10 GOING TO HAVE VERY LITTLE INFLUENCE ON SOMEONE WHO IS
11 ALREADY DEPENDENT ON THOSE CIGARETTES. AND BY 1966, WHEN
12 THAT CAME ON, WHEN THAT CAUTION LABEL WAS PUT ON PACKS OF
13 CIGARETTES, BY THAT POINT IN TIME PATRICIA WAS DEPENDENT.
14 SHE WAS A REGULAR SMOKER AND SHE NEEDED HER CIGARETTES.

15 AND WE KNOW FROM DR. BENOWITZ -- DR. BENOWITZ,
16 WHO WROTE AND DIRECTED AND EDITED THE SURGEON GENERAL'S
17 REPORT ON NICOTINE ADDICTION -- THAT IT TAKES A COUPLE OF
18 YEARS AND THEN MOST PEOPLE -- NOT EVERYONE. SOME PEOPLE ARE
19 LUCKY -- BECOME DEPENDENT, BECOME HOOKED.

20 SO YOU START OUT AS A TEENAGER. YOU START OUT AT
21 AGE 15. AND BY THE TIME YOU ARE THE ADULT THAT IS SUPPOSED
22 TO BE ABLE TO MAKE A CHOICE, IT'S TOO LATE. YOU'RE
23 DEPENDENT. YOU'RE HOOKED. YOUR BRAIN NEEDS THE DRUG.
24 NICOTINE IS A DRUG. AND IT AFFECTS THE RECEPTORS IN YOUR
25 BRAIN. IT MAKES CHANGES SO THAT WHEN YOU DON'T HAVE THE
26 DRUG, YOU DON'T FUNCTION AS WELL. YOU NEED THE DRUG TO GET
27 BACK TO BEING NORMAL. THAT'S WHAT NICOTINE DOES. CALL IT
28 DEPENDENCE. CALL IT ADDICTION.

0017
1 PEOPLE GET NERVOUS ABOUT THE WORD "ADDICTION,"
2 BECAUSE IT IMPLIES SOME MORALISTIC JUDGMENT. WE THINK OF
3 ADDICTS. WE THINK OF PEOPLE DOING SOMETHING ILLEGAL IN SOME
4 BACK ALLEY. SO IF THAT WORD DISTURBS YOU, USE THE WORD
5 "DEPENDENCE." AND DEPENDENCE ON NICOTINE IS SOMETHING THAT
6 PHILIP MORRIS SOLD. AND IT'S VERY, VERY CLEVER. IF YOU
7 SELL SOMETHING THAT AFFECTS PEOPLE AND CREATES A NEED IN
8 THEM, GUESS WHAT? THEY'LL KEEP BUYING THE CIGARETTES.
9 THEY'LL KEEP BUYING THE PRODUCT.

10 NO ONE NEEDS NICOTINE. WE ALL NEED TO EAT. WE
11 ALL NEED WATER. THERE ARE CERTAIN BASIC THINGS THAT OUR
12 BODIES REQUIRE. NICOTINE WAS NEVER ON THAT LIST.

13 NOW, WHEN I TALKED ABOUT GOING BACK IN TIME AND
14 LOOKING AT THE EXPECTATIONS OF THE ORDINARY CONSUMER, THE
15 ORDINARY PEOPLE AT THE TIME, CIGARETTES WERE A REGULAR PART
16 OF LIFE. CIGARETTES WERE ADVERTISED ON TV. THERE'S TWO
17 VOLUMES OF CIGARETTE COMMERCIALS. I PLAYED SOME OF THEM FOR
18 YOU, SOME OF THE CIGARETTE ADVERTISING.

19 AND YOU HEARD FROM DR. POLLAY, WHO STUDIES
20 COMMUNICATIONS, WHO STUDIES CONSUMER EXPECTATIONS, WHO
21 STUDIES THE INFLUENCES ON PEOPLE. AND YOU HEARD HIM TELL
22 YOU THAT IN THE '50S AND THE '60S, YOU COULDN'T BASICALLY
23 CHANGE THE CHANNEL WITHOUT COMING UPON A CIGARETTE AD. THEY

24 WERE PROMOTERS OF PROGRAMS.

25 PEOPLE ON THE PROGRAMS SMOKED. THEY WALKED OUT
26 OF THEIR ROLE ON THE PROGRAM AND THEY SMOKED IN THE
27 COMMERCIAL, AND THEY WALKED BACK INTO THEIR ROLE ON THE
28 PROGRAM AGAIN. FRED FLINTSTONE SMOKED. AND THERE WAS

0018

1 SMOKING IN THE MOVIES AND SMOKING WAS GLAMOROUS. SMOKING
2 WAS SOMETHING THAT MEANT YOU WERE GROWN UP.

3 IT'S WHY CHILDREN ARE SO INTERESTED IN IT.
4 CHILDREN WANT TO GROW UP. THEY WANT TO GROW UP A LOT FASTER
5 THAN WE WANT THEM TO. AND WHAT COULD BE MORE GROWN UP THAN
6 SMOKING A CIGARETTE? AND THEY COUNT ON THAT. BECAUSE IF
7 YOU'RE NOT A SMOKER BY THE TIME YOU'RE 18 OR 19, IT'S
8 UNLIKELY YOU ARE GOING TO BE A HOOKED SMOKER. AND IF YOU'RE
9 NOT A HOOKED SMOKER, YOU DON'T BUY THE CIGARETTES. IF YOU
10 DON'T BUY THE CIGARETTES, THEY DON'T MAKE MONEY. AND IT'S A
11 CYCLE.

12 AND AS PEOPLE DROP OFF, AS THEY LOSE THEM TO
13 ATTRITION -- AS IT SAYS IN SOME OF THE DOCUMENTS,
14 "ATTRITION" MEANING THEY DIE -- THEY NEED NEW PEOPLE TO
15 REPLACE THAT. AND WHAT IS THE POOL OF NEW PEOPLE?
16 TEENAGERS, PEOPLE WHO DON'T MAKE FREE CHOICES.

17 WE DO NOT ALLOW YOUTH, TEENAGERS, CHILDREN,
18 MINORS -- CALL THEM WHATEVER YOU WANT -- WE DO NOT ALLOW
19 THEM TO MAKE CONTRACTS. WE DO NOT ALLOW THEM TO GET
20 MARRIED. THEY CAN'T GO INTO THE MILITARY. THEY CAN'T
21 VOTE. AND YET THE ARGUMENT IS THAT AT 15, PATRICIA CHOSE TO
22 SMOKE WHEN SHE CAN'T MAKE THAT CONTRACT WITH THEM.

23 YOUR HONOR, THIS MIGHT BE A GOOD POINT.

24 THE COURT: OKAY. JURORS, I'M GOING TO GIVE YOU
25 A 15-MINUTE RECESS UNTIL 20 MINUTES TO 11:00. WHEN WE
RETURN FROM THE RECESS, THERE ARE TWO OF YOU THAT ARE SEATED
OUT OF ORDER AND I WANT TO GET YOU STRAIGHTENED OUT FOR THE
27 REST OF THE CASE, JUROR NOS. 11 AND 12.

0019

1 MR. LOUDIS, YOU SHOULD BE IN SEAT 12 AND
2 MS. BROWN SHOULD BE IN SEAT 11. NO, I HAVE GOT IT
3 BACKWARDS. MR. LOUDIS IS SEAT 11, MS. BROWN IS SEAT 12.
4 YOU ARE SITTING THE OPPOSITE WAY NOW. YOU JUST NEED TO
5 TRADE SEATS.

6 WE'LL SEE YOU BACK IN 15 MINUTES. PLEASE
7 CONTINUE TO FOLLOW THE ADMONITION.

8 (RECESS TAKEN FROM 10:25 TO 10:40)

9 THE COURT: WE'RE BACK ON THE RECORD. AND
10 MS. CHABER, YOU MAY PROCEED.

11 MS. CHABER: THANK YOU.

12 WHAT I'VE PUT UP HERE (REFERRING TO SCREEN) IS
13 ANOTHER INSTRUCTION SO THAT YOU UNDERSTAND WHEN YOU'RE
14 TALKING ABOUT THE CONSUMER, THE ORDINARY CONSUMER, WE'RE NOT
15 TALKING ABOUT GOVERNMENT, WE'RE NOT TALKING ABOUT INDUSTRY
16 STANDARDS. WE'RE TALKING ABOUT THE ORDINARY PERSON OUT
17 THERE.

18 IN 1954 -- PATRICIA, WE KNOW, WAS BORN IN 1946.
19 IN 1954 -- I'M NOT GOING TO TAKE YOU ALL THE WAY THROUGH THE
20 HISTORY OF THE EVOLUTION OF KNOWLEDGE ABOUT CANCER.

21 JUROR NO. 6: YOUR HONOR, IF THIS COULD BE JUST
22 MOVED A LITTLE BIT (REFERRING TO BOARD).

23 THE COURT: THANK YOU.

24 JUROR NO. 6: GREAT.

25 THE COURT: I'M NOT GOING TO TAKE YOU ALL THE
26 WAY THROUGH THE HISTORY OF THE EVOLUTION OF KNOWLEDGE ABOUT

27 LUNG CANCER BEING THE CAUSE, BUT I WILL READ YOU A COUPLE OF
28 STATEMENTS MADE.

0020

1 IN 1941, OCHSNER AND DEBAKEY:
2 "IT IS OUR DEFINITE CONVICTION THAT THE INCREASE
3 IN THE INCIDENCE OF PULMONARY CARCINOMA IS DUE
4 LARGELY TO THE INCREASE IN SMOKING, PARTICULARLY
5 CIGARETTE SMOKING, WHICH IS UNIVERSALLY
6 ASSOCIATED WITH INHALATION."

7 1950. WYNDER AND GRAHAM:

8 "THE ENORMOUS INCREASE IN THE SALE OF CIGARETTES
9 IN THIS COUNTRY APPROXIMATELY PARALLELS THE
10 INCREASE OF BRONCHOGENIC CARCINOMA."

11 AND THIS IS WHAT, WHEN WE'RE TALKING ABOUT

12 THIS -- AND THIS IS WHAT THEY WERE TALKING ABOUT
(INDICATING). THIS GOES ON NOW TO 1990. BUT YOU CAN SEE
13 THIS LINE REPRESENTS CIGARETTE CONSUMPTION. THIS HAPPENS TO
14 BE BY MALES. AS WE KNOW FROM TESTIMONY, WOMEN ARE SHIFTED
15 OVER BECAUSE THEY STARTED SMOKING LATER. AND THE LINE GOES
16 UP THEN WITH A 20-YEAR LATENCY PERIOD.

17 BUT HERE WE HAVE THE TURN OF THE CENTURY, LUNG
18 CANCER ALMOST AN UNKNOWN ENTITY. AND WE HAVE THE CIGARETTE
19 CONSUMPTION GOING UP. AND HERE WE HAVE PEOPLE WHO SMOKE
20 HERE. THIS IS WHERE THE DISEASE IS GOING AND THE DISEASE IS
21 PARALLELING THE CONSUMPTION. THIS IS SOMETHING THAT WYNDER
22 AND GRAHAM SAID IN 1950.

23 ALSO IN 1950, DR. DOLL AND HILL IN THE BRITISH
24 MEDICAL JOURNAL SAID:

25 "WE THEREFORE CONCLUDE THAT CIGARETTE SMOKING IS
26 A FACTOR AND AN IMPORTANT FACTOR IN THE
27 PRODUCTION OF CANCER OF THE LUNGS."

0021

1 BACK TO OCHSNER NOW WITH SOME OTHER PEOPLE,
2 1952:

3 "IT IS FRIGHTENING TO SPECULATE ON THE POSSIBLE
4 NUMBER OF BRONCHOGENIC CANCERS THAT MAY DEVELOP
5 AS THE RESULT OF THE TREMENDOUS NUMBER OF
6 CIGARETTES CONSUMED IN THE TWO DECADES FROM 1930
7 TO 1950." HE'S WRITING THIS IN 1952. "BECAUSE
8 OF INCREASED CIGARETTE SMOKING, IT IS LIKELY AND
9 PROBABLE THAT BRONCHOGENIC CARCINOMA SOON WILL
10 BECOME MORE FREQUENT THAN ANY OTHER CANCER IN THE
11 BODY, UNLESS SOMETHING IS DONE TO PREVENT ITS
12 INCREASE." 1952.

13 AND OF COURSE, WE KNOW THAT LUNG CANCER IS THE
14 NO. 1 CAUSE OF DEATH. WE KNOW THAT IT'S DUE TO CIGARETTE
15 SMOKING.

16 1953, DR. DOLL:

17 "THE RESULTS AMOUNT, I BELIEVE, TO PROOF THAT
18 SMOKING IS A CAUSE OF BRONCHIAL CARCINOMA."
19 CAUSE. 1953.

20 AND THEN WE LOOKED AT SOME OF THE MOUSE-SKIN
21 PAINTING. AND IT WAS ONLY MICE WITH THE CIGARETTE
22 CONDENSATES ON THEIR SKIN THAT DEVELOPED CANCER. NONE OF
23 THE CONTROLS DID.

24 1953, AN EDITORIAL, "CANCER OF THE LUNG," NEW
25 ENGLAND JOURNAL OF MEDICINE, ONE OF THE MOST PRESTIGIOUS
26 JOURNALS OF MEDICINE. THE LATEST STUDY OF DOLL.

27 "BASED ON 1,465 PATIENTS WITH CANCER OF THE LUNG
28 AND 1,465 MATCHED CONTROLS WAS CAREFULLY

0022

1 CONDUCTED AND YIELDED EVIDENCE OF AN ASSOCIATION
2 BETWEEN CIGARETTE SMOKING AND LUNG CANCER SO
3 STRONG AS TO BE CONSIDERED PROOF WITHIN THE
4 EVERYDAY MEANING OF THE WORD."

5 THIS IS 1953, CONTINUED:

6 "IF SIMILAR DATA HAD INCRIMINATED A FOOD
7 CONTAMINANT THAT WAS NOT HABIT-FORMING AND WAS
8 NOT SUPPORTED BY THE ADVERTISING OF A FINANCIAL
9 EMPIRE, THERE IS LITTLE DOUBT THAT EFFECTIVE
10 COUNTERMEASURES WOULD HAVE FOLLOWED QUICKLY. IT
11 IS NOT INSUFFICIENCY OF EVIDENCE THAT ACCOUNTS
12 FOR LACK OF SUCH MEASURES AGAINST TOBACCO TARS."
13 AND SO WHAT HAPPENS IN 1953? WHILE THE STUDIES I

14 HAVE JUST READ ARE COMING OUT -- AND THESE AREN'T
15 NECESSARILY STUDIES THAT THE ORDINARY CONSUMER IS GOING TO
16 KNOW ABOUT. THE ORDINARY CONSUMER DOESN'T NORMALLY READ THE
17 NEW ENGLAND JOURNAL OF MEDICINE. BUT THERE WAS SOME NEWS
18 ABOUT IT. THERE WAS SOME NEWS ABOUT THE MOUSE-SKIN
19 PAINTING.

20 AND SO WHAT DID THE DEFENDANTS DO? THEY GOT
21 TOGETHER -- THEY GOT TOGETHER AND THEY HIRED A PUBLIC
22 RELATIONS FIRM. THEY DIDN'T HIRE SCIENTISTS. THEY DIDN'T
23 HIRE THE WORLD'S EXPERTS. THEY HIRED A PUBLIC RELATIONS
24 FIRM. AND THE PUBLIC RELATIONS FIRM CAME UP WITH THE IDEA
25 IN ORDER TO REASSURE SMOKERS. YOU'VE GOT TO KEEP PEOPLE
26 SMOKING. YOU CAN'T HAVE THIS KIND OF INFORMATION OUT THERE
27 IN THE PRESS.

28 AND THEY CAME OUT AND THEY SAID THAT:

0023

1 "MEDICAL RESEARCH INDICATES MANY POSSIBLE CAUSES
2 OF LUNG CANCER" -- NOT SAID BY ANY OF THOSE
3 SCIENTISTS (INDICATING) -- "THAT THERE IS NO
4 AGREEMENT AMONG THE AUTHORITIES REGARDING WHAT
5 THE CAUSE IS."

6 THOSE ARE PRETTY DEFINITE, POSITIVE STATEMENTS
7 THAT WERE MADE, "PROOF, CAUSE, WITHIN THE EVERYDAY MEANING
8 OF THE WORD."

9 "THAT THERE IS NO PROOF THAT CIGARETTE SMOKING
10 IS ONE OF THE CAUSES."

11 EVERY ONE OF THOSE DOCTORS SAID: "THE CAUSE IS CIGARETTE
12 SMOKING. IF WE KEEP CIGARETTE SMOKING CONSUMPTION UP, IF
13 SOMETHING ISN'T DONE ABOUT IT, WE'RE GOING TO SEE WHAT WE
14 HAVE SEEN, AN INCREDIBLE RISE OF LUNG CANCER FROM AN UNKNOWN
15 DISEASE AT THE TURN OF THE CENTURY TO THE MOST FREQUENT
16 CANCER."

17 "THAT STATISTICS PURPORTING TO LINK CIGARETTE
18 SMOKING WITH THE DISEASE COULD APPLY WITH EQUAL
19 FORCE TO ANY ONE OF MANY OTHER ASPECTS OF MODERN
20 LIFE. INDEED, THE VALIDITY OF THE STATISTICS
21 THEMSELVES IS QUESTIONED BY NUMEROUS
22 SCIENTISTS."

23 OF COURSE, THEY HADN'T HIRED THE NUMEROUS
24 SCIENTISTS YET, BUT THEY MADE THE STATEMENTS ANYWAY. AND
25 HERE IS WHERE THEY MAKE THEIR STATEMENT ABOUT WHAT THEY CARE
26 ABOUT. THEY DON'T CARE ABOUT PROFITS.

27 "WE ACCEPT AN INTEREST IN PEOPLE'S HEALTH AS A
28 BASIC RESPONSIBILITY, PARAMOUNT TO EVERY OTHER

0024

1 CONSIDERATION IN OUR BUSINESS."
2 THE NO. 1 THING THAT ALL OF THESE TOBACCO

3 COMPANIES, ALL OF THESE CIGARETTE COMPANIES, PHILIP MORRIS,
4 HEALTH, NO. 1 BASIC RESPONSIBILITY. AND THEN THEY GO ON AND
5 THEY MAKE A STATEMENT:

6 "WE BELIEVE THE PRODUCTS WE MAKE ARE NOT
7 INJURIOUS TO HEALTH."

8 THAT'S THE ORDINARY CONSUMER'S EXPECTATION.

9 PEOPLE WHO MAKE THE PRODUCTS, THEY SAY: "LOOK, THERE'S A
10 CONTROVERSY. THERE'S ANOTHER SIDE TO IT."

11 THEY DON'T KNOW THAT A PUBLIC RELATIONS FIRM IS
12 DOING THIS. THEY DON'T KNOW THAT THE SCIENTISTS HAVEN'T
13 BEEN INTERVIEWED OR HIRED YET.

14 AND WHAT HAPPENS IN THE PRESS? WHAT HAPPENS
15 AFTER THIS WHOLE OUTRAGE ABOUT LUNG CANCER, MOUSE PAINTING?
16 THIS IS EXHIBIT 76. IT'S A 1959 DOCUMENT FROM WAKEHAM TO
17 ROBERT F. ROPER. NOW, ROPER IS ONE OF THOSE PEOPLE THAT
18 DOES THOSE SURVEYS.

19 "THE CONCLUSION IS THEN QUITE APPARENT, THAT THE
20 CIGARETTE BUSINESS WILL CONTINUE FOR A LONG, LONG
21 TIME. THIS IS NOT TO BELITTLE THE INFLUENCE OF
22 THE READER'S DIGEST OR PRONOUNCEMENTS BY THE
23 AMERICAN CANCER SOCIETY. THESE AGENCIES ALREADY
24 DEMONSTRATED THEIR EFFECTIVENESS TO EDUCATE THE
25 AMERICAN PUBLIC. BUT I THINK THERE IS A LIMIT TO
26 WHICH THEY CAN STRETCH THE FACTS. UNLESS ANY
27 FACTS CONDEMNING CIGARETTES ARE FORTHCOMING, THE
28 INFLUENCE OF THESE AGENCIES WILL WANNE. PEOPLE

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1 BECOME INURED TO FREQUENT CRIES OF WOE."

2 AND OF COURSE, MR. WAKEHAM ACKNOWLEDGES THAT ONE
3 OF THE MAIN REASONS PEOPLE SMOKE IS TO EXPERIENCE THE
4 PHYSIOLOGICAL EFFECTS OF NICOTINE ON THE HUMAN SYSTEM. SO
5 PUBLIC REACTION IS GOING TO WANNE. THE PUBLIC HEALTH
6 COMMUNITY COMES OUT. THEY SAY "SMOKING, CANCER." THERE'S A
7 LITTLE BIT OF A DECLINE. PEOPLE STOP SMOKING.

8 AND THEN GUESS WHAT? THAT DISAPPEARS FROM THE
9 NEWS. AND THE CIGARETTE COMPANIES TAKE OVER AND INUNDATE
10 THE MEDIA. THEY CALL UP THE PRESIDENTS OF THE NETWORKS.
11 THEY GO VISIT WITH EDITORS. THEY GET PUBLISHED WHAT THEY
12 WANT TO GET PUBLISHED. AND FOR EVERY HEALTH STORY THAT
13 THERE IS IN A NEWSPAPER OR IN A MAGAZINE, THERE ARE FIVE, 10
14 TIMES THE NUMBER OF STORIES TALKING ABOUT THIS CONTROVERSY.
15 THE CONTROVERSY THAT WAS CREATED FOSTERED BY PHILIP MORRIS
16 AND THE OTHER COMPANIES.

17 AND THE SAME THING HAPPENS IN 1964. THE SURGEON
18 GENERAL REPORT COMES OUT. THERE'S A LOT OF NEWS ABOUT IT.
19 THERE'S A LOT OF THINGS TO BE SAID, AND WHAT DO THEY DO?
20 THEY GO INTO ACTION.

21 "LET'S GET OUR STORIES OUT. THE SURGEON
22 GENERAL, THEY'VE MADE CONCLUSIONS THAT ARE NOT PROPER. THEY
23 HAVEN'T CONSIDERED THIS. IT'S JUST STATISTICS."

24 WELL, LADIES AND GENTLEMEN IT IS NOT JUST
25 STATISTICS. IT IS PEOPLE'S LIVES AND HEALTH, SOMETHING THAT
26 THEY CLAIMED WAS THE MOST IMPORTANT THING TO THEM. AND
27 BETWEEN THAT TIME WHEN THEY CLAIMED THAT, THE BEGINNING OF
28 1954 TO 10 YEARS LATER, THE SURGEON GENERAL'S REPORT, HAVE

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1 THEY DONE TESTING TO PROVE THAT THEIR PRODUCTS ARE NOT
2 INJURIOUS TO PEOPLE?

3 THE ANSWER TO THAT IS NO, THEY HAVE DONE NO
4 TESTING. THEY HAVE NOT FOLLOWED PEOPLE. THEY HAVE NOT EVEN
5 LOOKED AT THE ISSUE AS TO WHETHER THEIR PRODUCT, THE

6 CIGARETTE, IS INJURIOUS TO HEALTH, YET THEY CLAIM THAT
7 HEALTH IS THEIR NO. 1 CONCERN.

8 AND SO WHAT HAPPENS AFTER THE SURGEON GENERAL'S
9 REPORT? WHAT HAPPENS WITH THE PUBLIC? THIS IS EXHIBIT 80.
10 "SALES ON UPSWING. FEAR OF CIGARETTES CONTINUES
11 TO EBB. CIGARETTE PRODUCERS SAY OUTLOOK IS
12 ROSY."

13 AND THEY TALK ABOUT SELLING MORE CIGARETTES.
14 THEY TALK ABOUT HOW SALES HAVE RETURNED TO NORMAL. THIS IS
15 APRIL. THIS IS JUST BARELY MONTHS AFTER THE SURGEON
16 GENERAL'S REPORT. SALES HAVE RETURNED TO NORMAL. AND IT'S
17 BECAUSE OF ARTICLES LIKE THESE AND MANY OTHERS
18 (INDICATING). "LUNG SURGEON DOUBTS SMOKING LINK."

19 AND THAT'S WHAT THE PAPERS WERE FILLED WITH. AND
20 THAT WAS THE OTHER SIDE OF THE STORY. AND THE CONSUMER WHO
21 WAS GIVEN THAT STORY, THAT CONTROVERSY, THAT DOUBT BY THE
22 MANUFACTURER IS ENTITLED TO BELIEVE THEM. WE KNOW THAT
23 THAT'S NOT THE RIGHT CHOICE, BUT THEY'RE ENTITLED TO IT.
24 THE MANUFACTURER MAKES THIS PRODUCT AND TELLS PEOPLE "IT IS
25 NOT INJURIOUS TO HEALTH AND THAT THERE ARE SCIENTISTS OUT
26 THERE THAT SUPPORT OUR POINT OF VIEW." THE ORDINARY
27 CONSUMER IS ENTITLED TO BELIEVE THAT.

28 AND THAT, LADIES AND GENTLEMEN, MAKES THIS

0027

1 PRODUCT DEFECTIVE. AND YOUR ANSWER ON THE JURY VERDICT ON
2 THAT QUESTION SHOULD BE YES, THE PRODUCT FAILED TO PERFORM
3 AS SAFELY AS THE ORDINARY CONSUMER EXPECTED. THE ORDINARY
4 CONSUMER EXPECTED THAT THEY COULD SMOKE, THAT THEY COULD
5 SMOKE FOR A LONG TIME. AT SOME POINT IN TIME, IF IT
6 BOthered them, they could quit. THAT'S WHAT THE ORDINARY
7 CONSUMER EXPECTED.

8 AND THE ORDINARY 15-YEAR-OLD OR 16-YEAR-OLD OR
9 17-YEAR-OLD, WHEN THEY'RE ASKED -- YOU HEARD DR. BENOWITZ
10 TALK ABOUT THIS. WHEN TEENAGERS ARE ASKED: "DO YOU THINK
11 THAT YOU'LL STILL BE SMOKING FIVE YEARS FROM NOW?" THEIR
12 ANSWER IS ALMOST OVERWHELMINGLY "NO." THAT IS BECAUSE
13 NOBODY BELIEVES, PARTICULARLY A TEENAGER, THAT THEY'RE GOING
14 TO GET HOOKED, THAT THEY CAN'T EXERCISE FREE WILL AND STOP
15 WHENEVER THEY WANT.

16 AND JUST SO YOU DON'T THINK THAT I'M STUCK BACK
17 IN THE 1950S AND THE 1960S, WE CAN TAKE THIS ALL THE WAY UP
18 TO 1981, WRITTEN BY J.J. MORGAN, SOMEBODY YOU GOT TO SEE
19 HERE. AND THIS IS WHAT THEY DECIDE TO DO. THEY'RE
20 COMMITTED TO INSTITUTE NATIONAL ADVERTISING -- 1981 WE'RE
21 TALKING ABOUT -- TO REINFORCE THE SMOKER, HIS CHOICE TO
22 SMOKE AND THE CUSTOM OF SMOKING.

23 "THIS WILL BE ACCOMPLISHED BY ATTACKING BAD
24 RESEARCH, ATTACKING RESEARCHERS THEMSELVES, WHERE
25 VULNERABLE. ATTACKING THE UNREASONABILITY OF
26 LEGISLATIVE SEGREGATION, EXPOSING THE BUREAUCRACY
27 AND PERSONAL AGGRANDIZEMENT OF CERTAIN
28 ANTI-SMOKING ORGANIZATIONS. IN EFFECT, THE

0028

1 COMMUNICATIONS COMMITTEE IS READYING ADVERTISING
2 TO STAND UP TO THE INDUSTRY'S DETRACTORS."
3 AND BY THAT MEANS "SUPPORT OUR SMOKING
4 POPULATION. CONTINUE THE CONTROVERSY. GIVE SMOKERS
5 SOMETHING TO HANG THEIR HAT ON. IT STILL HASN'T BEEN
6 PROVEN."

7 THAT'S WHAT THEY SAY. THEY SAY IT NOW. THEY
8 SAID IT BEFORE CONGRESS. IT STILL HASN'T BEEN PROVEN.

9 I WANT TO TALK TO YOU A LITTLE BIT ABOUT NICOTINE
10 ADDICTION OR DEPENDENCE. AND I WANT TO TALK TO YOU ABOUT
11 PATRICIA. THIS SETS FORTH THE AMOUNT OF SMOKING THAT
12 PATRICIA DID. SHE WAS A HEAVY SMOKER. THERE IS NO QUESTION
13 ABOUT IT. OF COURSE, SHE SMOKED MORE WHEN SHE SWITCHED TO
14 THE LIGHTS.

15 NOW, I FOUND IT VERY INTERESTING THAT THE
16 MARLBORO LIGHTS WERE A LARGER SELLER THAN MARLBORO REDS,
17 UNTIL IT DAWNED ON ME THE REASON WHY. THEIR OWN STUDY, IF
18 YOU REMEMBER, SHOWED THAT BECAUSE OF THE WAY PEOPLE SMOKE,
19 THERE WAS NO DIFFERENCE BETWEEN WHAT YOU ULTIMATELY GOT FROM
20 THE MARLBORO LIGHTS AND THE MARLBORO REDS. THE ONLY PROBLEM
21 WAS YOU HAD TO SMOKE MORE OF THE LIGHTS TO GET THE
22 EQUIVALENT AMOUNT OF NICOTINE.

23 SO NO WONDER IT BYPASSED MARLBORO RED. THE MOST
24 POPULAR CIGARETTE FOR THE LAST 30 YEARS, BECAUSE THEY MADE A
25 CIGARETTE THAT YOU HAD TO SMOKE MORE OF TO GET THE SAME
26 AMOUNT OF NICOTINE FROM. AND SURE ENOUGH, IT'S THE NO. 1
27 CIGARETTE.

28 AND PATRICIA WENT FROM SMOKING TWO TO TWO AND A

0029
1 HALF PACKS A DAY TO SMOKING THREE TO THREE AND A HALF PACKS
2 A DAY. AND THAT WAS TO COMPENSATE, TO COMPENSATE FOR THE
3 AMOUNT OF NICOTINE THAT HER BODY, HER BRAIN REQUIRED IN
4 ORDER FOR HER TO FUNCTION NORMALLY.

5 NOW, SOME PEOPLE CAN PICK UP A CIGARETTE, SMOKE
6 ONE, AND GO FOR DAYS WITHOUT ONE. THAT'S NOT A PERSON WHO
7 IS ADDICTED OR WHO IS DEPENDENT. THAT'S A LUCKY PERSON.
8 THAT'S ALSO THE MORE UNUSUAL CASE. BUT THERE ARE PEOPLE OUT
9 THERE LIKE THAT.

10 BUT THAT'S NOT PATRICIA. PATRICIA WAS ADDICTED.
11 PATRICIA WAS DEPENDENT. SHE SMOKED ANYWHERE AND
12 EVERYWHERE. SHE WAS GROWING UP. SHE WAS BECOMING AN
13 ADULT. SHE SMOKED IN DOCTOR'S OFFICES. TAKE YOURSELF BACK
14 TO THAT TIME. THERE USED TO BE THOSE BIG ASHTRAYS IN THE
15 WAITING ROOM. YOU COULD SMOKE IN HOSPITALS.

16 WE KNOW SHE WAS ADDICTED, BECAUSE SHE COULD NOT
17 MAKE IT THROUGH A MOVIE WITHOUT HAVING TO GO OUT AND HAVE A
18 CIGARETTE, OR THROUGH THE NIGHT WITHOUT HAVING TO HAVE A
19 CIGARETTE. AND IF SHE DIDN'T HAVE ONE, SHE'D GO OUT AND BUY
20 A PACK. AT TIMES, SHE'D EVEN BUY A PACK TO HAVE AROUND TO
21 MAKE SURE SHE DIDN'T RUN OUT.

22 SHE DESCRIBED HERSELF AS A CHAIN SMOKER, THE KIND
23 OF PERSON WHO LIGHTS A CIGARETTE, MAY PUT IT DOWN, DOESN'T
24 EVEN REALIZE SHE ALREADY HAS ONE LIT AND LIGHTS ANOTHER
25 ONE. THAT IS AN ADDICTED SMOKER. AND I DIDN'T JUST BRING
26 YOU SOME DOCTOR OFF THE STREET TO TELL YOU THAT. I BROUGHT
27 YOU THE PERSON WHO WROTE THE 1988 SURGEON GENERAL'S REPORT
28 ON NICOTINE ADDICTION, DR. BENOWITZ. PATRICIA WAS AN

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1 ADDICTED SMOKER.

2 AND WE KNOW THAT THAT WAS SOMETHING -- ADDICTION,
3 NICOTINE -- THAT WAS BEING STUDIED AT PHILIP MORRIS.
4 EXHIBIT 1-57, 1959. AND THEY'RE LOOKING AT SMOKING AND
5 DRINKING COFFEE. YOU KNOW HOW WE TALKED ABOUT THINGS THAT
6 CAN REINFORCE EACH OTHER, GET ASSOCIATED WITH. AND WHAT IS
7 THE COMMENT HERE?

8 "SOME OF THE COMPOUNDS IN EACH"-- COFFEE AND
9 CIGARETTES -- "HAVE THIS DOUBLE EFFECT
10 PHYSIOLOGICALLY."
11 THAT'S NOT PSYCHOLOGICALLY. PHYSIOLOGICALLY YOUR

12 BODY CREATES AN EFFECT IN YOUR BODY. NICOTINE FIRST ACTS ON
13 THE NERVOUS SYSTEM AS A STIMULANT AND LATER AS A SEDATIVE.
14 A PRETTY INCREDIBLE DRUG. IT CAN DO BOTH THINGS. IT CAN
15 RELAX YOU OR IT CAN INCREASE YOUR ATTENTION SPAN AND
16 ENERGIZE YOU.

17 THIS IS EXHIBIT 1-63, OCTOBER 6TH, 1960. AND
18 IT'S FROM ONE OF THE OFFICERS, SELIGMAN, AND HE'S TALKING
19 ABOUT MAYBE COMING UP WITH SOME IDEA FOR BASICALLY A
20 SMOKELESS CIGARETTE, CHEWING GUM, SOMETHING ALONG THOSE
21 LINES THAT WILL PROVIDE ALL THE SATISFACTION OF SMOKING
22 WHILE CIRCUMVENTING THE WHOLE AREA OF HEALTH, TALKING ABOUT
23 CHEWING GUM.

24 THE PROBLEM WITH THAT IS THE PROBLEM WITH
25 ADMITTING THAT NICOTINE IS A DRUG. IF YOU DO THAT, THE FOOD
26 AND DRUG ADMINISTRATION IS YOUR BOSS, CONTROLS YOU. YOU
27 HAVE TO OPERATE UNDER THEIR RULES. AND THAT IS SOMETHING
28 THIS COMPANY DID NOT WANT TO DO.

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1 SO WHILE THEY COULD ADMIT INTERNALLY THAT
2 NICOTINE WAS A DRUG, THAT IT AFFECTED PEOPLE'S BODIES, THEY
3 COULD NOT ADMIT IT EXTERNALLY AND THEY STILL DO NOT ADMIT
4 IT. THEY STILL DO NOT ADMIT IT.

5 IN A FEW MINUTES, I'M GOING TO SHOW YOU A VERY
6 SHORT LITTLE CLIP FROM A VIDEOTAPE FROM 1994 FROM THE
7 CONGRESSIONAL HEARINGS OF MR. CAMPBELL, WHO WAS THE THEN
8 PRESIDENT OF PHILIP MORRIS. AND HERE IT IS. "IT WOULD
9 PLACE US UNDER DIRECT GOVERNMENT CONTROL."

10 NOW, OF COURSE, THEY LOOKED INTO DENICOTINIZING
11 CIGARETTES. YOU KNOW, WHEN DECAF COFFEE CAME OUT, IT WASN'T
12 VERY POPULAR. BUT NOW, LOTS OF PEOPLE DRINK DECAF COFFEE.
13 IT'S BECOME POPULAR.

14 1961. AND THEY TALK ABOUT SOME DEVELOPMENTS
15 WHERE THEY CAN REDUCE NICOTINE IN SMOKE TO ONE HALF, WHERE
16 IT CAN BE REDUCED TO ONLY 10 PERCENT.

17 "WE THINK THE FLAVOR OF OUR DENICOTINIZED
18 CIGARETTES IS SUPERIOR TO SANO AT EQUAL NICOTINE
19 LEVELS. IF WE WERE TO DENICOTINIZE SOMETHING
20 LIKE THE SO-LONITA PARLIAMENT BLEND, WE WOULD BE
21 ABLE TO PRODUCE A LOW-TAR AND EXTREMELY LOW-
22 NICOTINE CIGARETTE."

23 OF COURSE, THE PROBLEM WITH THAT IS THEN YOU
24 DON'T GET THE DRUG AND THEN YOU DON'T SELL THE CIGARETTES.

25 AND JUST IN CASE YOU THINK DR. BENOWITZ MADE UP
26 THAT WHOLE CONCEPT OF COMPENSATION, HERE IS MR. WAKEHAM TO
27 MR. CULLMAN, WHERE HE SAYS:

28 "THE CIGARETTES WHICH ARE NOW GROWING, THE

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1 MARLBORO, THE WINSTON, THE SALEM, THE CAMEL AND
2 THE PALL MALL ARE ALL DELIVERING APPROXIMATELY 30
3 MILLIGRAMS OF TPN OR MORE THAN ABOUT" -- IT'S
4 REALLY HARD TO READ -- IT LOOKS LIKE "8 PERCENT
5 NICOTINE CONTENT. AS WE KNOW, ALL TOO OFTEN THE
6 SMOKER WHO SWITCHES TO A HI-FI CIGARETTE WINDS UP
7 SMOKING MORE UNITS IN ORDER TO PROVIDE HIMSELF
8 WITH THE SAME DELIVERY WHICH HE HAD BEFORE."

9 THEY KNEW THAT IN 1961. YET WHEN PATRICIA CALLED
10 IN THE 1980S, WHAT WAS SHE TOLD? "WELL, SWITCH TO THE
11 LOW-TAR CIGARETTE."

12 AND I APOLOGIZE. THIS ONE IS ALMOST IMPOSSIBLE
13 TO READ. SO I WILL READ IT TO YOU. THIS IS FROM DR. DUNN
14 TO MR. WAKEHAM. WAKEHAM, REMEMBER, IS THE HEAD OF R&D.

15 "I WOULD BE MORE CAUTIOUS IN USING THE
16 PHARMIC-MEDICAL MODEL -- DO WE REALLY WANT TO
17 TOUT CIGARETTE SMOKE AS A DRUG? IT IS, OF
18 COURSE, BUT THERE ARE DANGEROUS FDA IMPLICATIONS
19 TO HAVING SUCH CONCEPTUALIZATION GO BEYOND THESE
20 WALLS."
21 ADMIT IT INTERNALLY, BUT DON'T ADMIT IT
22 EXTERNALLY OR YOU WILL BE REGULATED.

23 THIS IS ALSO PART OF EXHIBIT 76. THESE WERE
24 EXHIBITS THAT WERE TALKED ABOUT IN THE DEPOSITION THAT WE
25 READ OF MR. WAKEHAM, VICE PRESIDENT, CORPORATE RESEARCH AND
26 DEVELOPMENT. AND HE'S SENDING THIS TO THE COUNCIL FOR
27 TOBACCO RESEARCH. NOW, REMEMBER, 1953, WHEN THEY FORMED THE
28 GROUP, IT WAS CALLED THE TOBACCO INDUSTRY RESEARCH -- I

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1 ALWAYS GET THIS PART WRONG -- COUNCIL, COMMITTEE. ONE OR
2 THE OTHER -- TIRC AND THAT THEN SPLIT INTO TWO, TO THE
3 TOBACCO INSTITUTE AND TO CTR, THE CENTER FOR TOBACCO
4 RESEARCH.

5 AND MR. WAKEHAM IS WRITING TO DR. HOCKETT, THE
6 COUNCIL FOR TOBACCO RESEARCH, AND HE SAYS:

7 "WHILE THIS IS VERY INTERESTING TO US, IT IS
8 DEFINITELY NOT THE KIND OF SUBJECT MATTER WE
9 WOULD LIKE TO TAKE UP IN OUR CONFERENCE ON
10 MOTIVATIONS AND MECHANISMS OF SMOKING."
11 THEY'RE TALKING ABOUT THE "EFFECTS OF NICOTINE
12 AND/OR SMOKING ON THE CENTRAL NERVOUS SYSTEM."

13 "WE WOULD PROPOSE TO STAY FAR AWAY FROM THE
14 PSYCHO-PHARMACOLOGICAL FIELD."

15 AND THEN, OF COURSE, YOU KNOW, AND YOU SAW THIS
16 IN THE OPENING. MR. DUNN'S DESCRIPTION OF A CIGARETTE PACK
17 AS "A STORAGE CONTAINER FOR A DAY'S SUPPLY OF NICOTINE." NO
18 ONE HAS EVER BECOME A CIGARETTE SMOKER BY SMOKING CIGARETTES
19 WITHOUT NICOTINE WITH MOST OF THE PHYSIOLOGICAL EFFECTS.
20 REMEMBER, BODY CHANGES, RESPONSES TO INHALED SMOKE HAVE BEEN
21 SHOWN TO BE NICOTINE RELATED.

22 1978, MR. OSDENE FROM A CONFERENCE HE'S ATTENDED,
23 A CTR MEETING. A LITTLE INDUSTRY GROUP. AND WHAT DOES HE
24 SAY?

25 "DR. SELIGMAN BROUGHT UP THE GRANT BY DR. ABOOD
26 IN WHICH ONE OF THE STATED AIMS WAS TO MAKE A
27 CLINICALLY ACCEPTED ANTAGONIST TO NICOTINE."
28 REMEMBER, I READ TESTIMONY FROM OSDENE.

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1 "ANTAGONIST" WAS A SUBSTITUTE BASICALLY. SOMETHING THAT
2 WOULD COUNTER, USE INSTEAD.

3 "THIS GOAL WOULD HAVE THE POTENTIAL OF PUTTING
4 THE TOBACCO MANUFACTURERS OUT OF BUSINESS."
5 REMEMBER, HEALTH IS THEIR PARAMOUNT INTEREST.
6 1980 MORE OF THE SAME. "SMOKERS SMOKE FOR THE
7 NICOTINE EFFECT."

8 NOW, THIS IS ADDRESSED FROM T.S. OSDENE, PERSONAL
9 AND CONFIDENTIAL, TO DR. SELIGMAN AND DIRECTORS, AUGUST
10 12TH, 1980. TALKING ABOUT NEW PRODUCT DEVELOPMENT. NO. 2
11 TALKS ABOUT:

12 "THE BIOLOGICAL EFFECTS OF SMOKE. IN VIEW OF THE
13 CLOUDS ON THE HORIZON, WE MUST BE MORE AWARE OF
14 ACTIVITIES OF ADDITIVES, MATERIALS, ETCETERA, THE
15 CLOUDS ON THE HORIZON."

16 PEOPLE ARE STARTING TO LOOK INTO THAT WHAT THE
17 HECK IS IN CIGARETTES? WHAT ARE THE ADDITIVES? WHAT DO YOU

18 PUT IN IT? WHAT'S THE AMOUNT? WHAT'S THE CONCENTRATION?
19 HAVE YOU TESTED THESE MATERIALS TO SEE IF THEY'RE HARMFUL?
20 AND THEN THE NICOTINE PROGRAM.

21 "THIS PROGRAM INCLUDES BOTH BEHAVIORAL EFFECTS
22 AS WELL AS CHEMICAL INVESTIGATION. MY REASON FOR
23 THIS HIGH PRIORITY IS THAT I BELIEVE THE THING WE
24 SELL MOST IS NICOTINE."

25 SO WHY NOT ADMIT IT? WHY NOT SAY IT? "OKAY.
26 CIGARETTES. THEY ARE A DAY'S SUPPLY OF NICOTINE. IT'S
27 OKAY. YOU CAN GO BUY IT."

28 MARCH 21ST, 1980, TALKING ABOUT THE NICOTINE

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1 RECEPTOR PROGRAM. REMEMBER THE RECEPTOR PARTS IN THE BRAIN
2 THAT ARE AFFECTED BY THE NICOTINE. TALKING ABOUT THE
3 PSYCHOPHARMACOLOGY OF NICOTINE AND:

4 "ALL THE EFFORTS THAT ARE BEING DONE ARE AIMED
5 AT UNDERSTANDING THAT SPECIFIC ACTION OF NICOTINE
6 WHICH CAUSES THE SMOKER TO REPEATEDLY INTRODUCE
7 NICOTINE INTO HIS BODY. AND WHY SHOULD WE NOT BE
8 INVESTIGATING THE PSYCHOPHARMACOLOGY?

9 "IT IS WHERE OUR ATTORNEYS LEAST WANT US TO BE
10 FOR TWO REASONS. THE FIRST REASON IS THE OLDEST
11 AND IS IMPLICIT IN THE LEGAL STRATEGY EMPLOYED
12 OVER THE YEARS IN DEFENDING CORPORATIONS WITHIN
13 THE INDUSTRY FROM THE CLAIMS OF HEIRS AND ESTATES
14 OF DECEASED SMOKERS. WE WITHIN THE INDUSTRY ARE
15 IGNORANT OF ANY RELATIONSHIP BETWEEN SMOKING AND
16 DISEASE. WITHIN OUR LABORATORIES, NO WORK IS
17 BEING CONDUCTED ON BIOLOGICAL SYSTEMS."

18 "HEALTH, PUBLIC HEALTH, OUR NO. 1 PARAMOUNT
19 CONCERN." NOT ACCORDING TO THIS (INDICATING).

20 "AND THEN THE SECOND REASON IS THE MORE RECENT
21 CONCERN ARISING FROM INCREASINGLY FAVORABLE
22 PROSPECTS FOR THE SUCCESS OF A LEGISLATIVE EFFORT
23 TO TRANSFER AUTHORITY FOR THE REGULATION OF
24 TOBACCO MANUFACTURE TO A FEDERAL AGENCY, FDA,
25 KNOWN TO HAVE INTERESTS AND POWERS
26 ANTITHETICAL" -- OPPOSED -- "TO THE INTERESTS OF
27 THE INDUSTRY."

28 I THOUGHT THE "INTERESTS OF THE INDUSTRY," THE

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1 NO. 1 MOST IMPORTANT INTEREST OF THE INDUSTRY WAS THE HEALTH
2 OF THE PUBLIC, THE HEALTH OF THE SMOKERS.

3 "ANY ACTION ON OUR PART, SUCH AS RESEARCH ON THE
4 PSYCHOPHARMACOLOGY OF NICOTINE WHICH IMPLICITLY
5 OR EXPLICITLY TREATS NICOTINE AS A DRUG COULD
6 WELL BE VIEWED AS A TACIT ACKNOWLEDGMENT THAT
7 NICOTINE IS A DRUG. SUCH ACKNOWLEDGMENT, CONTEND
8 OUR ATTORNEYS, WOULD BE UNTIMELY. SO THEREFORE,
9 ALTHOUGH WE ARE GOING TO DO SOME SORT OF PROGRAM,
10 WE MUST NOT BE VISIBLE ABOUT IT. OUR ATTORNEYS
11 WILL LIKELY CONTINUE TO INSIST UPON A CLANDESTINE
12 EFFORT IN ORDER TO KEEP NICOTINE, THE DRUG, IN
13 LOW PROFILE."

14 AND WHAT'S THE OTHER REAL DANGER OF ADMITTING
15 NICOTINE IS A DRUG? THIS IS 16-23, SEPTEMBER 9TH, 1980.
16 I'M GOING TO GO BACK TO THE FRONT PAGE. THIS IS FROM THE
17 TOBACCO INSTITUTE. REMEMBER, ALL OF THE COMPANIES FORMED
18 THE TIRC AND THEN TIRC SPLIT INTO THE TOBACCO INSTITUTE.
19 THAT'S WHAT THIS IS. AND THEY'RE TALKING ABOUT A SURPRISE
20 STORY ON AUGUST 8TH THAT "THE NATIONAL INSTITUTE OF DRUG

21 ABUSE WANTS 'ADDICTED' ADDED TO THE CIGARETTE WARNING." AND
22 THIS WRITER IS "WONDERING IF THE INSTITUTE," MEANING THE
23 TOBACCO INSTITUTE, "WAS CAUGHT UNAWARE ON THIS MATTER."
24 AND HERE'S THE REASON YOU CAN'T DO THAT:
25 "SHOOK, HARDY REMINDS US, I'M TOLD, THAT THE
26 ENTIRE MATTER OF ADDICTION IS THE MOST POTENT
27 WEAPON A PROSECUTING ATTORNEY CAN HAVE IN A LUNG
28 CANCER CIGARETTE CASE. WE CAN'T DEFEND CONTINUED

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1 SMOKING AS FREE CHOICE IF THE PERSON WAS
2 ADDICTED."

3 NOW, LET'S SEE IF I CAN DO THIS (MOVING
4 ELECTRICAL EQUIPMENT).

5 THE COURT: YOU'RE GOING TO HAVE TO TAKE SOME
6 MEASURES THAT THE CORD DOESN'T GET IN THE WAY. ANYWAY, I
7 DON'T WANT TO INTERRUPT THE ARGUMENT.

8 MS. CHABER: I'M GIVING UP ON GETTING IT
9 CLOSER. JUST WHEN I THOUGHT I KNEW HOW TO WORK THIS
10 (REFERRING TO VCR CONTROLS).

11 WHILE WE'RE GETTING THAT SET UP, THIS WILL BE THE
12 1994 TESTIMONY OF MR. CAMPBELL BEFORE CONGRESS. THAT'S THE
13 WRONG ONE. IN ANY CASE, MY USUAL AUDIOVISUAL GLITCHES. I
14 WANT TO BE CONSISTENT THROUGHOUT THE TRIAL.

15 LET ME TALK TO YOU A LITTLE BIT ABOUT SCIENTIFIC
16 RESEARCH WHILE WE GET THAT SET UP. AND LET ME TALK ABOUT
17 THE PARAMOUNT CONCERN OF PHILIP MORRIS AND THE OTHER
18 COMPANIES, HEALTH, THE BASIC RESPONSIBILITY, YOUR HEALTH.
19 AND THEY'RE TALKING ABOUT WHAT THE INDUSTRY IS GOING TO DO
20 WITH RESPECT TO SCIENTIFIC STUDIES.

21 AND THERE'S A WHOLE LONG LIST OF THE SCIENTIFIC
22 STUDIES THAT THEY'RE GOING TO DO. 1980, FROM MR. SELIGMAN
23 TO DR. ALEXANDER SPEARS, WHO IS THE HEAD OF LORILLARD.
24 AFTER GOING THROUGH A LIST OF POTENTIAL LONG-TERM PROJECTS,
25 "SUBJECTS TO BE AVOIDED." SINCE HALF OF YOU CAN'T SEE IT,
I WILL READ THEM.

27 "1. DEVELOPING NEW TESTS FOR CARCINOGENICITY.
28 "2. ATTEMPT TO RELATE HUMAN DISEASE TO SMOKING."

0038
1 THESE ARE WHAT THEY'RE GOING TO AVOID.
2 "3. CONDUCT EXPERIMENTS WHICH REQUIRE LARGE
3 DOSES OF CARCINOGEN TO SHOW ADDITIVE EFFECT OF
4 SMOKING."
5 SO DON'T DO RESEARCH. "HUMAN HEALTH, OUR NO. 1
6 CONCERN."

7 (VIDEOTAPE PLAYED, AS FOLLOWS:)

8 "REP. RON WYDEN: LET ME ASK YOU FIRST -- AND
9 I'D LIKE TO JUST GO DOWN THE ROW -- WHETHER EACH
10 OF YOU BELIEVES THAT NICOTINE IS NOT ADDICTIVE.
11 I HEARD VIRTUALLY ALL OF YOU TOUCH ON IT, AND
12 JUST YES OR NO. DO YOU BELIEVE NICOTINE IS NOT
13 ADDICTIVE?

14 "MR. CAMPBELL: I BELIEVE NICOTINE IS NOT
15 ADDICTIVE, YES.

16 "MR. JOHNSTON" --

17 (END OF PLAYING OF VIDEOTAPE)

18 MR. OHLEMAYER: THAT ISN'T --

19 THE COURT: HOLD ON. TURN THAT OFF. GO AHEAD.

20 MS. CHABER: IT DIDN'T GO ON.

21 MR. OHLEMAYER: MY OBJECTION IS WE HAVE A CLEAR
22 UNDERSTANDING OF HOW MUCH OF THIS IS IN EVIDENCE.

23 THE COURT: THAT IS CORRECT. I'M GOING TO HAVE

24 TO LEAVE IT UP TO YOU TO IMPLEMENT THAT PART. I DON'T KNOW
25 WHAT WAS ABOUT TO BE SHOWN.

26 MS. CHABER: IT WAS, AND THAT WAS WHERE THAT
27 ENDED.

28 THE COURT: OKAY. ALL RIGHT.

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1 MS. CHABER: THAT WAS MR. CAMPBELL, THE
2 PRESIDENT OF PHILIP MORRIS IN 1994?

3 "DO YOU BELIEVE NICOTINE IS ADDICTIVE?

4 "NO."

5 1994. SO THEY'VE BEEN TALKING ABOUT IT
6 INTERNALLY SINCE THE 1950S, AND YET HE HAS NOT ADMITTED IT.
7 (VIDEOTAPE PLAYED, AS FOLLOWS:)

8 "A SPEAKER: EVERYBODY IS SO CONSIDERATE --

9 "REP. JOHN BRYANT: YOU TALKED ABOUT -- I KNOW
10 YOU ASKED MR. CAMPBELL ABOUT THIS AND ABOUT ALL
11 THE EFFORTS THAT HAVE BEEN MADE TO REDUCE
12 NICOTINE IN CIGARETTES. BUT IF INDEED NICOTINE
13 IS NOT ADDICTIVE AND IT'S NOT HARMFUL, WHY IS IT
14 HELPFUL TO YOUR CASE TO BOAST THAT YOU'RE WORKING
15 HARD AND HAVE SUCCEEDED IN REDUCING LEVELS OF
16 NICOTINE?

17 "MR. CAMPBELL: WE DON'T -- WE DON'T IN ANY WAY
18 IMPLY THAT -- WE JUST DO WHAT OUR CONSUMERS WANT,
19 THAT WE DID SOME POLLING, SOME RESEARCH. THEY
20 TOLD US THAT THEY'D BE INTERESTED IN A
21 NO-NICOTINE CIGARETTE, SO WE OFFERED ONE. WE'VE
22 TRIED VERY HARD TO LOWER TAR NUMBERS OVER THE
23 PAST. ESSENTIALLY, WE'RE JUST RESPONDING TO OUR
24 CONSUMERS' EXPRESSED WANTS IN THE WAY OF NEW
25 PRODUCTS, AND THAT ALLOWS ME THE OPPORTUNITY TO
TRY TO GET SOME OF MY COLLEAGUES' BUSINESS."
(END OF PLAYING OF VIDEOTAPE)

28 MS. CHABER: LET ME ASK "SO IS IT FOR HEALTH OR

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1 RESPONDING TO WHAT OUR CONSUMERS WANT?" THAT'S NOT THE
2 ANSWER THAT YOU WOULD EXPECT FROM A COMPANY THAT PROMISED IN
3 1954 THAT THEY WOULD FIND OUT ALL THE ANSWERS, THAT HEALTH
4 IS THE NO. 1 CONCERN, THE MOST IMPORTANT CONCERN TO THIS
5 COMPANY.

6 THE NO. 1 CONCERN TO THIS COMPANY, THIS GREEN
7 LINE HERE (INDICATING) OR GREEN BAR REPRESENTS NONSMOKERS
8 AND LUNG CANCER DEATH RATES. AND YOU'LL SEE THAT ACROSS
9 TIME, 1960 -- THIS STUDY HAPPENED TO END LOOKING AT 1986 --
10 NO INCREASE AT ALL. BUT LOOK AT WHAT'S HAPPENED TO LUNG
11 CANCER AND WOMEN. IT'S GONE UP AND UP AND UP, JUST LIKE IT
12 DID FOR MEN.

13 AND YES, IT'S SOMETHING THAT PARALLELS THE
14 SALES. HERE'S THE SPECIFIC TYPE OF CANCER THAT PATRICIA HAS
15 (INDICATING). AND THIS SHOWS THAT DOSE RESPONSE THAT WE
16 TALKED ABOUT.

17 "LESS THAN 20 A DAY FOR LESS THAN 35 YEARS, MORE
18 THAN 20 A DAY. LESS THAN 20 A DAY BUT FOR MORE
19 THAN 35 YEARS AND MORE THAN 20 A DAY FOR MORE
20 THAN 35 YEARS."

21 AND WE TALKED ABOUT QUITTING. AND THERE'S
22 NOTHING I'M GOING TO SAY TO DISCOURAGE ANYONE FROM QUITTING
23 SMOKING. BUT THERE IS SOMETHING THAT IS A CONCERN. AND
24 THAT'S THIS (INDICATING). THIS IS FROM THE SURGEON
25 GENERAL'S REPORT. THIS IS LOOKING AT TIME, THE NUMBER OF
26 YEARS FROM STOPPING. AND WE'RE TALKING ABOUT MORTALITY

27 RATIOS. WE'RE TALKING ABOUT HOW MANY TIMES MORE A PERSON
28 WHO SMOKED BUT HAS QUIT OVER TIME IS AT RISK FOR CANCER.

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1 AND IN THE FIRST FOUR YEARS, THAT RATE IS STILL
2 UP ALMOST TO 20. AFTER 10 YEARS -- AFTER 10 YEARS OF
3 QUITTING, IT'S STILL EIGHT TIMES. AFTER 14 YEARS OF
4 QUITTING, IT'S STILL FIVE TIMES. IT STAYS THAT WAY PRETTY
5 MUCH TILL AFTER 19 YEARS. AND WHEN YOU GET DOWN TO 20 YEARS
6 FROM HAVING QUIT, 20 OR MORE YEARS, YOU STILL HAVE A TWO
7 TIMES RISK. YOU STILL HAVE A 200 PERCENT INCREASE IN
8 LIKELIHOOD OF GETTING LUNG CANCER.

9 SO YES, QUITTING IS GOOD, BUT QUITTING WOULDN'T
10 HAVE SOLVED PATRICIA'S PROBLEM. AND THERE WAS MUCH MADE OUT
11 OF PATRICIA HAVING QUIT SMOKING FOR GOOD. THE PROBLEM IS
12 PATRICIA NEVER WAS ABLE TO FIND OUT IF SHE WOULD HAVE BEEN
13 ABLE TO QUIT SMOKING FOR GOOD AFTER THIS ATTEMPT, BECAUSE
14 SHE WAS DIAGNOSED WITH THE CANCER SHORTLY AFTERWARDS.

15 AND THEN SHE DID HER INVESTIGATION. SHE WANTED
16 TO PROVE THAT THIS WAS NOT -- NOT DUE TO SMOKING. MAYBE IT
17 WAS THE ASBESTOS IN THAT STOVE IN THAT OLD APARTMENT. BUT
18 ULTIMATELY, SHE CONCLUDED, AS DID HER DOCTORS, IT WAS
19 SMOKING.

20 NOW, I TOLD YOU THAT THE VERDICT FORM WAS GOING
21 TO TAKE YOU THROUGH A LOT OF DIFFERENT QUESTIONS, AND I
22 WOULDN'T HAVE TIME TO TAKE YOU THROUGH ALL OF THEM, AND I
23 DON'T. WE TALKED ABOUT THE ONE PERFORMING AS SAFELY AS THE
24 ORDINARY CONSUMER WOULD EXPECT. THERE'S ALSO IT COULD BE
25 DEFECTIVE IF THERE WAS NOT AN ADEQUATE WARNING AND BECAUSE
26 OF FEDERAL LAW, THE TIME FRAME THAT YOU CAN CONSIDER THAT,
27 THAT IS 1969.

28 BUT I THINK IT'S IMPORTANT THAT YOU CONSIDER THAT

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1 TIME FRAME, BECAUSE THAT'S THE TIME FRAME WHEN SHE WAS THE
2 STARTER SMOKER. THAT'S THE TIME FRAME WHEN SHE WAS THE
3 TEENAGER BECOMING HOOKED. AND THERE WAS NOTHING UP TO '66.
4 AND FROM '66 TO '69, "CAUTION. MAY BE HAZARDOUS."

5 YOU'RE ALSO GOING TO BE ASKED TO DETERMINE
6 WHETHER THE DEFENDANT WAS NEGLIGENT AND THE DEFENDANT DID
7 THINGS THAT AN ORDINARY PRUDENT PERSON WOULDN'T DO WITH THE
8 KNOWLEDGE THAT THEY HAD.

9 AND YOU'RE GOING TO SEE THAT THERE'S NO QUESTION
10 HERE FOR WHETHER PATRICIA WAS NEGLIGENT. YOU'RE GOING TO BE
11 ASKED WHETHER THEY BREACHED AN EXPRESS WARRANTY, WHETHER
12 THEY'RE SAYING "OUR PRODUCTS ARE NOT INJURIOUS. GO AHEAD
13 AND SMOKE THESE THINGS," WHETHER THEY BREACHED THAT
14 WARRANTY.

15 YOU'RE GOING TO BE ASKED IF THEY COMMITTED FRAUD
16 BY INTENTIONAL MISREPRESENTATION. DID THEY MISREPRESENT A
17 PAST OR EXISTING MATERIAL FACT? "NICOTINE IS NOT
18 ADDICTIVE. CIGARETTE SMOKING DOESN'T CAUSE LUNG CANCER."
19 THAT'S WHAT THEY SAY.

20 AND THROUGHOUT THESE QUESTIONS ON THE FRAUD
21 EITHER THROUGH MISREPRESENTATION, THROUGH CONCEALMENT,
22 THROUGH DECEIT, YOU'RE GOING TO BE ASKED IF THE PLAINTIFF
23 RELIED ON THE TRUTH OF THE REPRESENTATION AND IF SHE WAS
24 JUSTIFIED IN RELYING ON THE REPRESENTATION.

25 AND I'D ASK YOU TO THINK BACK TO OUR DISCUSSIONS
26 EARLIER ABOUT WHETHER A PERSON IS JUSTIFIED IN RELYING ON
27 THE REPRESENTATIONS OF THE MAKER OF THE PRODUCT THAT THEIR
28 PRODUCT IS NOT INJURIOUS, WILL NOT KILL YOU, IS NOT

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1 ADDICTIVE. AND IT'S A SIMILAR ONE HERE, FRAUD BY
2 CONCEALMENT.

3 AND AGAIN, YOU'LL GO THROUGH THESE QUESTIONS.
4 NINE OR MORE OF YOU MUST AGREE ON EACH QUESTION. A
5 DIFFERENT NINE CAN AGREE ON EACH QUESTION. IT DOESN'T HAVE
6 TO BE THE SAME NINE. AND YOU MOVE ON AND YOU'LL SEE THERE
7 ARE INSTRUCTIONS FOR FOLLOWING ALONG.

8 THE CLAIM OF FRAUD BY FALSE PROMISE. DID THEY
9 PROMISE THAT THEY WOULD FIND THE ANSWER? DID THEY PROMISE
10 THAT PEOPLE'S HEALTH WAS THE MOST IMPORTANT THING AND THAT
11 THEY WOULD ANSWER THE SCIENTIFIC CONTROVERSY? HAVE THEY
12 ANSWERED IT YET?

13 THEY MAKE A PROMISE TO THE PEOPLE WHO BUY THEIR
14 PRODUCTS, A PROMISE THAT SAYS: "WE DON'T INTEND TO KILL
15 YOU. THERE'S CONTROVERSY. IT ISN'T PROVEN. IT ISN'T
16 PROVEN." THAT'S WHAT THEY SAY.

17 "NEGIGENT MISREPRESENTATION," THAT'S MAKING A
18 REPRESENTATION WITHOUT KNOWING WHETHER IT'S TRUE OR NOT.
19 "INTENTIONAL" IS YOU KNOW YOU'RE WRONG, YOU KNOW IT'S NOT
20 TRUE BUT YOU MAKE THE REPRESENTATION ANYWAY.

21 AND THEN YOU'LL BE ASKED WHETHER OR NOT PHILIP
22 MORRIS DID THIS ALONE, OR DID THEY AND THE OTHER TOBACCO
23 COMPANIES ENTER INTO AN AGREEMENT, AN AGREEMENT THAT STARTED
24 IN 1953 TO MISREPRESENT, TO CONCEAL, TO SUPPRESS?

25 AND THEN, WHEN YOU GET THROUGH ALL OF THAT, AND
26 ASSUMING THAT YOU HAVE ANSWERED YES TO SOME OR ALL OF THE
27 QUESTIONS THAT YOU'VE BEEN ASKED, YOU ARE THEN ASKED TO
28 DETERMINE:

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1 "WHAT IS THE TOTAL AMOUNT OF COMPENSATORY
2 DAMAGES, IF ANY, SUSTAINED BY PLAINTIFF AND
3 CAUSED BY THE WRONGFUL CONDUCT UPON WHICH YOU
4 BASE YOUR FINDING OF LIABILITY?"

5 THE UNCONTROVERTED MEDICAL TESTIMONY WAS THAT IT
6 COST \$75,000 TO DATE FOR PATRICIA'S MEDICAL BILLS. AND
7 ANOTHER 50,000 IN THE FUTURE. THAT'S ECONOMIC DAMAGE.

8 YOU'LL ALSO CONSIDER NONECONOMIC DAMAGE, THINGS
9 LIKE PAIN, SUFFERING, EMOTIONAL DISTRESS. AND I WANT YOU TO
10 CONSIDER THE TESTIMONY OF PATRICIA, THE TESTIMONY OF DR.
11 MENA, WHAT PATRICIA'S GONE THROUGH, WHAT SHE WILL GO
12 THROUGH. I WANT YOU TO CONSIDER THE FACT THAT THERE'S
13 LIKELY TO BE 30 LESS YEARS FOR HER TO ENJOY HER LIFE, HER
14 FAMILY, HER CHILDREN, HER GRANDCHILDREN.

15 AND ALTHOUGH WHAT I SUGGEST TO YOU IS NOT
16 EVIDENCE, YOU'RE ENTITLED, AS 12 MEMBERS OF THIS COMMUNITY,
17 TO PUT YOUR COLLECTIVE MINDS TOGETHER TO COME UP WITH WHAT
18 IS FAIR AND REASONABLE COMPENSATION. I WOULD SUGGEST FOR
19 THE 30 YEARS, 25,000 A YEAR. AND I WOULD SUGGEST FOR THE
20 PAIN AND SUFFERING THAT SHE HAS GONE THROUGH, CHEMOTHERAPY,
21 RADIATION, \$100,000. AND THE TOTAL MEDICALS WERE 125,000,
22 TO WHICH THERE IS NO DISPUTE.

23 AND THIS AMOUNT, LADIES AND GENTLEMEN, IS
24 COMPENSATORY DAMAGES. IT'S NOT PUNITIVE DAMAGES. YOU ARE
25 NOT TO INCLUDE ANYTHING FOR PUNISHMENT.

26 YOU WILL, HOWEVER, BE ASKED THE QUESTION OF
27 WHETHER OR NOT "PHILIP MORRIS WAS GUILTY OF OPPRESSION,
28 MALICE, OR FRAUD?" AND I WANT TO TALK TO YOU JUST A LITTLE

0045

1 BIT ON THE JURY INSTRUCTIONS ON WHAT OPPRESSION, MALICE AND
2 FRAUD ARE.

3 IT HELPS THAT I CLEANED UP AND I CAN'T FIND
4 THEM.

5 THE COURT: WHILE YOU'RE LOOKING FOR THAT, LET
6 ME JUST SAY YOU ASKED ME TO ADVISE YOU WHEN YOU HAD 15
7 MINUTES LEFT, AND I'M JUST GOING TO TAKE THIS OPPORTUNITY,
8 SINCE THERE'S THIS BREAK, TO TELL YOU THERE IS 20 MINUTES
9 LEFT.

10 MS. CHABER: I'M RIGHT ON SCHEDULE.

11 THE COURT: I'M ONLY DOING THAT BECAUSE YOU
12 ASKED ME.

13 MS. CHABER: I KNOW.

14 THE COURT: ALL RIGHT.

15 MS. CHABER: AND I THANK YOU.

16 NOW, WE TALKED ABOUT FRAUD EARLIER, THE
17 MISREPRESENTATION, THE CONCEALMENT, THE FALSE PROMISE. THIS
18 IS A LITTLE BIT DIFFERENT USE OF FRAUD AND THE PLAINTIFF
19 ALSO HAS A DIFFERENT BURDEN OF PROOF. ON ALL OF THESE OTHER
20 ISSUES, ON ALL OF THEM, ON DEFECTIVE PRODUCT, ON NEGLIGENCE,
21 ON MISREPRESENTATION, ON CONCEALMENT, THE PLAINTIFF'S BURDEN
22 IS THE PREPONDERANCE OF THE EVIDENCE, THE TIPPING OF THE
23 SCALES.

24 ON THE ISSUE OF WHETHER THE DEFENDANT ACTED WITH
25 MALICE, FRAUD OR OPPRESSION, I HAVE A HIGHER BURDEN. IT'S
26 STILL NOT AS HIGH AS BEYOND A REASONABLE DOUBT. IT'S WHAT'S
27 CALLED CLEAR AND CONVINCING EVIDENCE.

28 WE HAVE BROUGHT YOU CLEAR AND CONVINCING

0046

1 EVIDENCE. AND I'LL READ YOU WHAT THE DEFINITION IS OF
2 OPPRESSION, MALICE AND FRAUD.

3 "'OPPRESSION' MEANS DESPICABLE CONDUCT THAT
4 SUBJECTS A PERSON TO CRUEL AND UNJUST HARSHSHIP,
5 IN CONSCIOUS DISREGARD OF THAT PERSON'S RIGHTS."
6 "'MALICE' MEANS CONDUCT WHICH IS INTENDED BY THE
7 DEFENDANT TO CAUSE INJURY TO THE PLAINTIFF." OR
8 "'DESPICABLE CONDUCT,' WHICH IS CARRIED ON BY
9 THE DEFENDANT WITH A WILLFUL AND CONSCIOUS
10 DISREGARD FOR THE RIGHTS OR SAFETY OF OTHERS.
11 A PERSON ACTS WITH CONSCIOUS DISREGARD OF THE
12 RIGHTS OR SAFETY OF OTHERS WHEN HE OR SHE IS
13 AWARE OF THE PROBABLE CONSEQUENCES OF HIS OR HER
14 CONDUCT AND WILLFULLY AND DELIBERATELY FAILS TO
15 AVOID THOSE CONSEQUENCES."

16 THINK ABOUT THEIR BEHAVIOR. THINK ABOUT THEIR
17 CLAIMS, THINK ABOUT THE CLAIM THAT HEALTH WAS THEIR NO. 1
18 CONCERN. AND ASK YOURSELF THE QUESTION ABOUT THE DOCTORS
19 BACK IN THE '40S AND THE '50S WHO SAID "IF SOMETHING IS NOT
20 DONE ABOUT THIS, WE ARE GOING TO SEE A RISE OF LUNG CANCER
21 UNHEARD OF." WE HAVE SEEN THE RISE OF LUNG CANCER
22 ASTRONOMICALLY DUE TO SMOKING.

23 ASK YOURSELVES WHETHER THEIR CONDUCT WAS IN
24 CONSCIOUS DISREGARD OF THE HEALTH AND THE SAFETY OF OTHERS?
25 ASK YOURSELF WHETHER THEY WERE AWARE OF THE PROBABLE
26 CONSEQUENCES OF THEIR CONDUCT? THOSE ARE THE QUESTIONS YOU
27 SHOULD ASK YOURSELF.

28 "'DESPICABLE CONDUCT' IS CONDUCT WHICH IS SO

0047

1 VILE, BASE, CONTEMPTIBLE, MISERABLE, WRETCHED OR
2 LOATHSOME THAT IT WOULD BE LOOKED DOWN UPON AND
3 DESPISED BY ORDINARY, DECENT PEOPLE."

4 NOW, A CORPORATION GETS TO BE A PERSON IN A COURT
5 OF LAW. PHILIP MORRIS IS ONE PERSON. ALL ITS ACTORS ARE

6 PART OF THAT ONE PERSON. ASK YOURSELF WHETHER IF A PERSON
7 DID WHAT PHILIP MORRIS DID, IGNORED PEOPLE'S HEALTH, ACTED
8 IN SUCH A WAY THAT THEY WERE AWARE THAT MORE AND MORE AND
9 MORE PEOPLE WOULD DIE, ASK YOURSELF WHY THEY ARE THE NO. 1
10 BRAND AMONG TEENAGERS? ASK YOURSELF WHY THEY STUDIED
11 TEENAGERS 12 TO 19, 15 TO 19 YEARS OLD? ASK YOURSELF
12 WHETHER THAT CONDUCT IS DESPICABLE?

13 AND IN THE CONTEXT OF THIS PART OF THE CLAIM OF
14 PUNITIVE DAMAGES, "'FRAUD' MEANS AN INTENTIONAL
15 MISREPRESENTATION, DECEIT OR CONCEALMENT OF A
16 MATERIAL FACT KNOWN TO THE DEFENDANT, WITH THE
17 INTENTION ON THE PART OF THE DEFENDANT OF THEREBY
18 DEPRIVING A PERSON OF PROPERTY OR LEGAL RIGHTS OR
19 OTHERWISE CAUSING INJURY."

20 ASK YOURSELF WHETHER THEY DID THAT? WHEN YOU
21 CONCLUDE ASKING YOURSELF THESE QUESTIONS, THE EVIDENCE IS
22 CLEAR. PHILIP MORRIS DOESN'T CARE, DIDN'T CARE, HASN'T
23 CARED ABOUT THE HEALTH AND SAFETY OF ANYONE. ALL THEY CARE
24 ABOUT IS MAKING MONEY. THANK YOU.

25 THE COURT: OKAY. SINCE WE FINISHED 10 MINUTES
26 BEFORE THE PREDICTED TIME, LET ME JUST HAVE A VERY BRIEF
27 SIDEBAR WITH COUNSEL AS TO HOW YOU WANT TO HANDLE THE 10
28 MINUTES.

0048

1 (COURT AND COUNSEL CONFER OUTSIDE
2 THE PRESENCE OF THE JURY)

3 THE COURT: OKAY. AFTER TALKING TO THE LAWYERS,
4 WHAT WE'RE GOING TO DO IS USE THAT 10 MINUTES BY GIVING YOU
5 10 EXTRA MINUTES FOR LUNCH.

6 SO WE'RE GOING TO RESUME AT THE TIME THAT WE WERE
7 BEFORE, WHICH IS GOING TO BE AT 1:15. BUT LET'S ALL BE HERE
8 PROMPTLY AT 1:15. WE NEED TO START SHARPLY ON TIME. AND
9 PLEASE CONTINUE TO FOLLOW THE ADMONITION. YOU KNOW HOW
10 CRITICAL IT IS THAT YOU DO THAT. WE'LL SEE YOU AT 1:15.

11 (LUNCH RECESS TAKEN AT 12:05 A.M.)

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0049

1 AFTERNOON SESSION 1:15 P.M.
2 WEDNESDAY, FEBRUARY 3, 1999

3 (THE FOLLOWING PROCEEDINGS WERE HELD IN
4 THE COURTROOM, IN THE PRESENCE OF THE JURY)

5 THE COURT: GOOD AFTERNOON, EVERYBODY. MR.
6 OHLEMAYER, YOU MAY PROCEED.

7 MR. OHLEMAYER: THANK YOU. IF IT PLEASE THE
8 COURT, YOUR HONOR, COUNSEL, LADIES AND GENTLEMEN. THE FIRST

9 THING I WANT TO DO IS THANK YOU ON BEHALF OF PHILIP MORRIS,
10 ON BEHALF OF PATTI ZAPPARELLI AND ON BEHALF OF MR. BARRON
11 AND MS. MASON.

12 THERE'S JURY DUTY AND THERE'S JURY DUTY WITH A
13 CAPITAL "D," AND YOU ALL DID JURY DUTY WITH A CAPITAL "D."
14 WE ALL APPRECIATE YOUR PATIENCE AND YOUR ATTENTION.

15 THERE'S REFERENCE IN THE INSTRUCTIONS THAT THE
16 JUDGE READ YESTERDAY TO JUSTICE. AND IN A CASE LIKE THIS,
17 IT DOESN'T MATTER WHETHER YOU ARE A PERSON OR A COMPANY,
18 WHETHER YOU ARE POPULAR OR UNPOPULAR, WHETHER YOU SELL A
19 PRODUCT THAT MOST PEOPLE USE OR MOST PEOPLE DON'T USE,
20 YOU'RE STILL ENTITLED TO THE SAME CONSIDERATION OF THE
21 EVIDENCE.

22 AND JUSTICE IN A CASE LIKE THIS IS DONE THROUGH
23 THE EVIDENCE YOU HEAR IN THE COURTROOM AND INVOLVES THE
24 PROOF THAT YOU HEAR IN THE COURTROOM AND HOW YOU APPLY THAT
25 PROOF TO THE INSTRUCTIONS THAT THE JUDGE GAVE YOU
26 YESTERDAY.

27 AND MS. CHABER SAID THAT PATRICIA HENLEY IS NOT
28 ON TRIAL, AND SHE CERTAINLY IS CORRECT. BUT PHILIP MORRIS

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1 ISN'T ON TRIAL BECAUSE PHILIP MORRIS SOLD CIGARETTES.

2 THERE ARE A LOT OF BROAD ISSUES ABOUT CIGARETTES
3 AND TOBACCO THAT CAN BE DEBATED AND PERHAPS PEOPLE DO
4 DEBATE, BUT THE ISSUES YOU HAVE TO DECIDE IN THIS CASE ARE
5 NARROWER AND INVOLVE SPECIFIC CLAIMS THAT MS. HENLEY HAS
6 MADE ABOUT PHILIP MORRIS' PRODUCT, ABOUT ITS CONDUCT AND
7 ABOUT THINGS THAT IT MAY OR MAY NOT HAVE SAID, THAT MS.
8 HENLEY MAY OR MAY NOT HAVE ACTED UPON. SO THOSE ARE THE
9 ISSUES YOU HAVE TO DECIDE IN THIS CASE.

10 AND MS. HENLEY CERTAINLY HAS THE RIGHT TO BRING A
11 LAWSUIT LIKE THIS, BUT WITH THE RIGHT COMES THE OBLIGATION
12 TO PROVE THE CLAIMS, AND THAT'S WHAT YOU HEARD ABOUT IN
13 TERMS OF THE BURDEN OF PROOF. AND ONE OF THE THINGS THAT
14 HAS TO BE PROVED IN THIS CASE IS THAT MS. HENLEY HAS A
15 CANCER THAT ACTUALLY STARTED IN HER LUNG. AND I'M GOING TO
16 TELL YOU ABOUT THAT AND THE EVIDENCE WE HEARD ON THAT IN A
17 FEW MINUTES.

18 BRIEFLY, THOUGH, REMEMBER THE EVIDENCE WAS THAT
19 THE BIOPSY OF MS. HENLEY'S CANCER DID NOT COME FROM HER
20 LUNG. IT CAME FROM OUTSIDE HER LUNG. AND THAT MOST LUNG
21 CANCERS, CANCERS THAT START IN THE LUNG ARE BIOPSIED FROM
22 TUMORS THAT ARE WITHIN THE LUNG.

23 WE HEARD A LOT ABOUT STATISTICS AND ABOUT SMALL
24 CELL CARCINOMA FREQUENTLY APPEARING OR OCCURRING IN THE
25 LUNG. BUT YOU ALSO HEARD DOCTORS TELL YOU THAT STATISTICS
26 ARE IMPORTANT TO CREATE SUSPICIONS OR TO POINT YOU IN THE
27 RIGHT DIRECTION. THEY'RE IMPORTANT TO HELP YOU DETERMINE
28 HOW TO TREAT SOMEBODY'S CANCER.

0051

1 IT'S ANATOMY, EVIDENCE THAT YOU COLLECT FROM THAT
2 PATIENT, THE SYMPTOMS, THE X-RAYS, THE BIOPSY, THINGS LIKE
3 THAT THAT YOU USE TO ACTUALLY DIAGNOSE THE DISEASE OR
4 DETERMINE WHERE IT STARTED. I'M GOING TO TELL YOU ABOUT
5 THAT EVIDENCE IN A MINUTE.

6 IN FACT, THE EVIDENCE IN THIS CASE, ALL THE
7 THINGS WE KNOW ABOUT MS. HENLEY'S CANCER, WHERE IT WAS
8 FOUND, WHAT IT LOOKS LIKE, HOW IT'S BEHAVED, CONTRADICT THE
9 STATISTICS THAT THE DOCTORS TOLD ABOUT WITH RESPECT TO SMALL
10 CELL CARCINOMA AND WHETHER OR IF IT STARTS IN THE LUNG.

11 AND REALLY, IT'S NOT SO SIMPLE AS SAYING "LET'S

12 LISTEN TO DR. MENA AND DR. HAGEN." BECAUSE BOTH OF THEM
13 TOLD YOU THAT WHAT THEY WERE DOING WAS TRYING TO DIAGNOSE
14 AND TREAT MS. HENLEY. AND THEIR TREATMENT OF MS. HENLEY
15 WOULDN'T HAVE BEEN ANY DIFFERENT WHETHER THE TUMOR STARTED
16 INSIDE THE LUNG OR OUTSIDE THE LUNG. GIVEN WHERE IT WAS,
17 AND GIVEN HER OTHER SYMPTOMS, THEY WOULD HAVE TREATED HER
18 THE EXACT SAME WAY.

19 SO IT IS, I THINK, HELPFUL IN A CASE LIKE THIS TO
20 HEAR FROM DOCTORS, THE DOCTORS THAT MS. CHABER BROUGHT TO
21 COURT, THE DOCTORS LIKE DR. HENSLEY AND DR. WARREN AND DR.
22 RYMER, WHO HAVE EXPERIENCE WITH CANCERS AND WHO CAN TELL YOU
23 HOW THIS CANCER COMPARES AND CONTRASTS TO THE THINGS THEY'VE
24 DONE IN THEIR PRACTICE. AND SO I THINK IT'S NOT QUITE AS
25 SIMPLE PERHAPS AS MS. CHABER MAY HAVE SUGGESTED.

26 IF IT WAS THAT SIMPLE, THEN WHY IS THIS TUMOR,
27 THIS CANCER SO DIFFERENT THAN WHAT PEOPLE DESCRIBED AS A
28 TYPICAL OR THE USUAL LUNG CANCER? WE'LL TALK ABOUT THAT IN

0052

1 A MINUTE.

2 THE OTHER THING, THE NEXT THING I'M GOING TO TALK
3 ABOUT THEN IS THE EVIDENCE THAT RELATES TO PHILIP MORRIS.
4 AND CERTAINLY, YOU'VE HEARD THAT TOBACCO AND SMOKING AND
5 CIGARETTES ARE SOMETHING THAT HAVE BEEN CRITICIZED FOR A
6 PERIOD OF TIME. THEY HAVE BEEN SCRUTINIZED, THEY HAVE BEEN
7 ANALYZED AND THERE HAS BEEN A LOT WRITTEN AND SAID ABOUT
8 CIGARETTES.

9 ONE OF THE FIRST THINGS YOU HEARD IN THIS CASE
10 FROM DR. DAVIS, WHO WAS ONE OF THE FIRST WITNESSES, WAS THAT
11 THERE IS NO SUCH THING AS A SAFE CIGARETTE. AND THEN WHAT
12 WE HEARD THROUGHOUT THE CASE AND ESPECIALLY WHEN DR. ELLIS,
13 CATHY ELLIS WAS HERE, ARE THE THINGS YOU COULD DO TO MAKE A
14 LESS HAZARDOUS CIGARETTE OR TO REDUCE THOSE THINGS.

15 I'M GOING TO SHOW YOU WHAT PHILIP MORRIS HAS DONE
16 ABOUT THAT. I'M GOING TO SHOW YOU WHAT THE GOVERNMENT AND
17 OTHERS HAVE SAID ABOUT THAT. I'M GOING TO SHOW YOU THE
18 EVIDENCE THAT SUGGESTS THAT REDUCING TAR AND NICOTINE MAY
19 ACTUALLY REDUCE RISKS, ALTHOUGH IT'S HARD TO PROVE THINGS
20 LIKE THAT.

21 BUT THE ONE THING YOU DIDN'T HEAR IN THIS CASE
22 WAS ANYBODY TESTIFY THAT PHILIP MORRIS COULD HAVE DONE MORE,
23 COULD HAVE DONE BETTER, COULD HAVE DONE MORE PATENTS, COULD
24 HAVE DONE IT DIFFERENTLY IN TERMS OF HOW THEY DESIGNED
25 CIGARETTES. THE EVIDENCE YOU WILL HEAR IS THAT THEY HAVE
26 DONE A LOT TO DESIGN AND MARKET CIGARETTES THAT REDUCE THE
27 RISKS THAT ARE ASSOCIATED WITH SMOKING.

28 ONE THING I WANT TO GET OUT OF THE WAY BEFORE I

0053

1 MOVE ON IS THIS ISSUE OF FLAVORINGS AND INGREDIENTS.
2 REMEMBER AGAIN, THE FIRST WITNESS IN THE CASE, DR. DAVIS.
3 DR. DAVIS SAID THAT IF YOU TOOK ALL OF THOSE THINGS OUT OF
4 CIGARETTES, YOU WOULDN'T HAVE A SAFE CIGARETTE.

5 HE SAID THAT THE DEPARTMENT OF HEALTH AND HUMAN
6 SERVICES HAS GOTTEN A LIST OF THESE INGREDIENTS FOR A PERIOD
7 OF TIME, AND THEY HAVE BEEN REQUIRED TO REPORT TO CONGRESS
8 ON ANYTHING ON THAT LIST THAT THEY THOUGHT CREATED A RISK TO
9 THE SMOKER. THEY'VE NEVER MADE SUCH A REPORT. ALL THE
10 THINGS ON THAT LIST ARE FOUND IN FOOD AND NATURE. THEY'RE
11 IN SMALL QUANTITIES IN CIGARETTES.

12 AND ALTHOUGH THE PRECISE RECIPE AND HOW THEY GET
13 COMBINED IN ANY PARTICULAR CIGARETTE IS A TRADE SECRET, THE
14 LIST OF THINGS THAT ARE USED TO FLAVOR OR PROCESS TOBACCO

15 WHEN YOU MAKE CIGARETTES IS SOMETHING THAT'S BEEN PUBLISHED
16 FOR SOME TIME.

17 REMEMBER, DR. ELLIS ALSO SAID THAT PART OF WHAT
18 THE TOBACCO WORKING GROUP DID, THE GROUP THAT THE NATIONAL
19 CANCER INSTITUTE PUT TOGETHER, WAS DID SOME TESTS ON THOSE
20 KINDS OF ISSUES TO SEE WHETHER THE ADDITION OF THOSE
21 FLAVORINGS CREATED ANY MORE POTENTIAL FOR BIOLOGICAL
22 PROBLEMS OR ACTIVITY IN CIGARETTES.

23 AND THEN FINALLY, I WANT TO TALK TO YOU ABOUT MS.
24 HENLEY AND WHAT SHE KNEW AND WHAT OTHERS KNEW OR BELIEVED
25 ABOUT CIGARETTE SMOKING AT VARIOUS POINTS IN TIME, ABOUT HER
26 DECISION TO SMOKE, AND THEN ABOUT THE PRACTICE OF SMOKING
27 AND WHETHER, HOW OR WHEN PEOPLE HAVE CALLED IT A HABIT OR AN
28 ADDICTION OR A DEPENDENCE.

0054

1 SO THE FIRST THING I THINK I WANT TO TALK TO YOU
2 A LITTLE BIT ABOUT IS CANCER. AND YOU'LL REMEMBER THAT IN
3 THE PLAINTIFF'S CASE, DR. HAMMAR AND DR. FEINGOLD AND EVEN
4 DR. DAVIS TO A CERTAIN EXTENT AGREED WITH A LOT OF THIS, IF
5 NOT ALL OF IT. MOST CANCER HAS NO KNOWN CAUSE. THERE IS
6 STILL A LOT ABOUT CANCER THAT PEOPLE DON'T KNOW. THEY
7 HAVEN'T BEEN ABLE TO DETERMINE ANY CANCER THAT HAS ONLY ONE
8 KNOWN CAUSE. AND YOU CAN'T TELL WHAT CAUSED A CANCER BY
9 LOOKING AT IT.

10 AND DR. HAMMAR AND DR. FEINGOLD AND OTHERS, AND
11 DR. HENSLEY SAID THAT WHEN YOU LOOK AT A CANCER UNDER THE
12 MICROSCOPE, YOU CAN'T DETERMINE WITHOUT MORE INFORMATION
13 WHERE IN THE BODY IT CAME FROM OR WHAT CAUSED IT. IF YOU
14 HAVE TWO CANCERS THAT LOOK ALIKE, THE SAME TYPE OF CANCER
15 BUT WERE CAUSED BY DIFFERENT THINGS, THEY WOULD LOOK ALIKE
16 UNDER THE MICROSCOPE. BUT DOCTORS DON'T NEED TO DETERMINE
17 WHAT CAUSES A CANCER IN ORDER TO DIAGNOSE IT OR TREAT IT.

18 PEOPLE INVOLVED IN THE TREATMENT OF CANCER ARE
19 TRYING TO HELP DETERMINE WHETHER THERE IS A CANCER IN
20 SOMEBODY'S BODY, AND IF SO, WHERE IT IS, AND WHAT THEY CAN
21 DO TO STOP IT OR TO SLOW IT DOWN. YOU DON'T HAVE TO
22 DETERMINE WHAT CAUSED IT IN ORDER TO DIAGNOSE IT OR TREAT
23 IT.

24 AND REMEMBER DR. HAGEN, THE SURGEON WHO TESTIFIED
25 ON A FRIDAY AFTERNOON A FEW WEEKS AGO. ON REDIRECT, AFTER
26 MS. CHABER HAD ASKED QUESTIONS AND I HAD ASKED QUESTIONS, HE
27 SORT OF EXPLAINED THAT IN A LITTLE DIFFERENT WAY. I'M GOING
28 TO GET TO THAT IN A MINUTE. BUT HE SAID DOCTORS HAVE TO

0055

1 MAKE A LOT OF DECISIONS BASED ON A LIMITED AMOUNT OF
2 INFORMATION SOMETIMES.

3 AND FORTUNATELY, AS DR. MENA AND DR. RYMER SAID,
4 THERE IS A WIDE RANGE OF TREATMENT THAT WILL COVER A LOT OF
5 DIFFERENT TYPES OF DISEASES. SO ONCE YOU DETERMINE WHAT
6 KIND OF CANCER YOU'RE DEALING WITH, AND ONCE YOU DETERMINE
7 WHETHER YOU CAN OPERATE ON IT, IT REALLY DOESN'T MATTER WHAT
8 CAUSED IT IN ORDER TO DIAGNOSE IT AND TO TREAT IT.

9 YOU HEARD ABOUT METASTASIS, THE FACT THAT CANCER
10 CAN SPREAD FROM ONE PART OF THE BODY TO ANOTHER. AND IN
11 FACT, THAT'S SOMETHING THAT DOCTORS LOOK AT IN ORDER TO TRY
12 TO DECIDE WHERE A CANCER STARTED GROWING.

13 YOU HEARD FROM DR. HENSLEY THAT BASED ON THE
14 STUDIES INVOLVING AUTOPSIES, THAT THERE ARE TIMES IN
15 SOMEBODY'S LIFE WHERE A CANCER IS FOUND IN ONE PART OF THE
16 BODY BUT WHEN AN AUTOPSY IS DONE, THEY FIND CANCER IN
17 ANOTHER PART OF THE BODY THAT THEY DIDN'T KNOW ABOUT. AND

18 THAT'S ONE OF THE REASONS THAT SOME OF THESE STATISTICS WITH
19 RESPECT TO DEATH CERTIFICATES MAY BE INACCURATE IN TERMS OF
20 HOW MANY DISEASES EACH YEAR ARE DIAGNOSED.

21 BUT THE LUNG -- YOU HEARD DR. HAMMAR SAY THIS,
22 YOU HEARD DR. HORN AND OTHERS SAY IT -- IS THE FIRST AND THE
23 MOST FREQUENT SITE OF METASTASIS. YOU ALSO HEARD DR. HAMMAR
24 AND DR. HORN SAY THAT ALMOST HALF OF ALL CANCER FOUND IN THE
25 LUNG IS CANCER THAT STARTED SOMEWHERE ELSE AND SPREAD TO THE
26 LUNG.

27 SO TO DETERMINE WHERE SOMEBODY'S CANCER STARTED,
28 YOU CAN'T REALLY USE STATISTICS, BECAUSE YOU NEED MORE

0056

1 INFORMATION. AS DR. HENSLEY SAID, YOU NEED ANATOMY. BUT
2 STATISTICALLY SPEAKING, HALF OF THE CANCERS THAT ARE FOUND
3 IN THE LUNG DIDN'T START THERE, BECAUSE THE LUNG IS A PLACE
4 WHERE CANCER SPREADS, BECAUSE IT GETS ALL THE BLOOD AND IT
5 HAS THE KIND OF TISSUE THAT CANCER CAN GROW IN.

6 BUT THE FIRST THING THE PLAINTIFF HAS TO PROVE IN
7 THIS CASE IS THAT THERE IS A CANCER THAT ACTUALLY STARTED IN
8 MS. HENLEY'S LUNG. AND THAT'S THE PLAINTIFF'S BURDEN OF
9 PROOF. AND THE EVIDENCE IN THIS CASE ISN'T SUFFICIENT TO
10 PROVE OR ESTABLISH THAT THE CANCER ACTUALLY STARTED IN MS.
11 HENLEY'S LUNG.

12 IN DECEMBER OF 1997 -- THIS IS DEFENDANT'S
13 2788 -- MS. HENLEY WENT TO THE DOCTOR AND THEY DID AN X-RAY
14 AND THEY SAW A HILAR MASS. YOU HEARD A LOT ABOUT THE HILAR
15 OR THE HILUM. AND WE HEARD IT DESCRIBED AS A ROOT, AS A
16 DOOR, AS AN AREA. IT'S NOT PART OF THE LUNG IN THE SAME WAY
17 AS THE DOOR -- YOU CAN CALL THE DOOR PART OF THE ROOM.

18 BUT WHAT THE HILAR REGION IS IS THE SPACE BETWEEN
19 THE LUNG AND THE CHEST WHERE THE VEINS AND THE AIRWAYS GO
20 INTO THE LUNG. THINGS IN THE HILAR REGION OF THE LUNG OR
21 THE HILAR REGION OF OTHER ORGANS AREN'T NECESSARILY IN THOSE
22 ORGANS.

23 HE WAS SUSPICIOUS, BASED ON HER CLINICAL
24 HISTORY. AND WE HEARD ABOUT CLINICAL BIAS IN TWO DIFFERENT
25 WAYS. CLINICAL BIAS IS AN IMPORTANT TOOL WHICH DOCTORS USE
26 TO FORM AN ALTERNATIVE OR DIFFERENTIAL DIAGNOSES. YOU HAVE
27 A WOMAN WITH A SUSPICIOUS CHEST X-RAY WHO WAS A SMOKER. THE
28 DOCTOR THINKS: "I NEED TO RULE OUT OR CHECK OUT THE ISSUE

0057

1 OF LUNG CANCER."

2 LIKEWISE, YOU HEARD ABOUT CLINICAL BIAS IN THAT
3 SOMETIMES YOU TAKE WHAT YOU KNOW AND USE IT TO FORM OPINIONS
4 BEFORE YOU GET EVIDENCE THAT MAY OR MAY NOT SUPPORT THOSE
5 OPINIONS. I'LL TALK ABOUT THAT IN A MINUTE.

6 SO THEY ORDERED SOME TESTS, A SPUTUM CYTOLOGY
7 TEST. AND THEY WAITED TO SEE WHAT THE RESULTS WERE. AND
8 REMEMBER THE DISCUSSION OF SYMPTOMS AND COUGHING UP BLOOD,
9 WHAT THEY CALLED HEMOPTYSIS.

10 ALL THE DOCTORS WHO TESTIFIED AGREED THERE WAS
11 INCONSISTENT EVIDENCE IN THE MEDICAL RECORDS ABOUT THIS
12 ISSUE. THERE WAS A DESCRIPTION OF AN EPISODE OF COUGHING UP
13 BLOOD, AND THERE WAS A DENIAL OF COUGHING UP BLOOD. THERE
14 WAS A RECORD THAT SEEMED TO BE EQUIVOCAL ON IT.

15 THEY ALL TOLD YOU THAT COUGHING UP BLOOD IS NOT
16 NECESSARILY A SYMPTOM YOU NEED FOR HAVING A CANCER THAT
17 STARTS IN YOUR LUNG. THERE ARE OTHER THINGS THAT CAN CAUSE
18 SOMEBODY TO COUGH UP BLOOD.

19 BUT WHAT DR. WARREN SAID WAS IN THIS CASE, THE
20 THING THAT WOULD PRODUCE THE COUGHING UP OF BLOOD IN A

21 PATIENT WITH LUNG CANCER ISN'T PRESENT, AND THAT'S
22 ABNORMALITIES OR LESIONS IN THE AIRWAYS, IN THE BRONCHUS.
23 AND THEY WEREN'T PRESENT IN THIS CASE. SO THE SYMPTOMS
24 AREN'T UNIQUE TO LUNG CANCER. THEY ARE SOMETHING YOU SHOULD
25 USE TO BE SUSPICIOUS OF LUNG CANCER.

26 BUT IN THIS CASE, WHEN THE DOCTORS GOT THE
27 EVIDENCE AND THE INFORMATION LATER, THEY DETERMINED THERE
28 WAS NOTHING IN THE AIRWAYS OR IN THE LUNG THAT WOULD HAVE

0058
1 PRODUCED THAT SYMPTOM THE WAY IT DOES IN CASES WITH PEOPLE
2 WHO HAVE A CANCER THAT STARTS IN THE LUNG.

3 WE HEARD ABOUT SPUTUM CYTOLOGY, WHICH IS WHERE
4 YOU SPIT UP SOME FLUID, AND THE DOCTORS LOOK AT IT UNDER THE
5 MICROSCOPE. AND YOU HEARD ALL THE DOCTORS SAY THAT YOU
6 WOULD BE VERY RELUCTANT AS A DOCTOR TO DIAGNOSE SOMEBODY AS
7 HAVING CANCER BASED ON SPUTUM CYTOLOGY. YOU WOULD WANT MORE
8 INFORMATION. BUT THEY ALSO SAID THAT MOST OF THE PEOPLE WHO
9 HAVE A CANCER IN THEIR LUNG THAT STARTED IN THEIR LUNG, THE
10 TEST IS POSITIVE.

11 AND IN MS. HENLEY'S CASE, THE 2ND OF JANUARY, IT
12 WAS NEGATIVE. THE SPUTUM CYTOLOGY TEST WAS NEGATIVE. SO
13 THEY ORDERED X-RAYS AND CT SCANS. AND THIS IS THE SPUTUM
14 CYTOLOGY REPORT (INDICATING). THE SPUTUM CYTOLOGY REPORT IS
15 EXHIBIT 2789.

16 THIS IS EXHIBIT 2790, WHICH IS THE CT AND THE
17 X-RAY REPORT, THE CHEST X-RAY. THE DOCTORS WHO INTERPRETED
18 THE CHEST X-RAY WROTE A MEDICAL RECORD, WROTE A REPORT TO
19 GIVE TO THE OTHER DOCTORS INVOLVED IN THE DIAGNOSIS THAT
20 SAID "NO FOCAL INFILTRATES."

21 AND DR. MENA SAID THAT INFILTRATES AREN'T
22 NECESSARILY A TUMOR, BUT THEY ARE THE KINDS OF THINGS THAT
23 MAKE YOU SUSPICIOUS OF A TUMOR. THEY DIDN'T FIND ONE IN THE
24 LUNG, BUT THEY DID SEE THIS MASS IN THE MEDIASTINUM, IN THE
25 LEFT HILUM, THE "UPPER MEDIASTINAL AND LEFT HILAR MASS."

26 IT'S INTERESTING THAT "HILAR" IS USED AS AN
27 ADJECTIVE, NOT REALLY A NOUN. IT'S MODIFYING "THE MASS."
28 THEY THEN DID A CT SCAN. YOU REMEMBER YOU HAD

0059
1 THE DOCTORS EXPLAIN TO YOU WHAT A CT SCAN IS. "THE LUNGS
2 APPEAR CLEAR, EXCEPT FOR A FAINT INFILTRATE" THAT NOBODY WHO
3 LOOKED AT THE CT SCAN AT THIS POINT SUGGESTED WAS CANCER.
4 DR. HAGEN DIDN'T THINK THAT WAS CANCER, NOR DID DR. WARREN.

5 "THE CT SCAN DEMONSTRATED A MEDIASTINAL AND LEFT
6 HILAR MASS." SO AT THIS POINT, NOBODY HAS DIAGNOSED MS.
7 HENLEY WITH LUNG CANCER. THEY'RE STILL DOING SOME MORE
8 TESTS.

9 THIS IS EXHIBIT 2787. AND SHE WENT BACK TO THE
10 DOCTOR ON THE 6TH OF JANUARY. AND HERE IS ONE OF THE
11 INCONSISTENCIES IN THE COUGHING UP OF BLOOD:

12 "DENIES HEMOPTYSIS. CT SCAN. HILAR MEDIASTINAL
13 MASS DISCUSSED. SUSPICIOUS ABOUT LUNG CANCER AND
14 THE NEED FOR FURTHER DIAGNOSTIC TESTS. FOR
15 EXAMPLE, BRONCHOSCOPY VERSUS PERCUTANEOUS NEEDLE
16 ASPIRATION."

17 DR. WARREN AND DR. HAGEN TALKED ABOUT THAT.
18 SOMETIMES IF YOU CAN SEE ON AN X-RAY WHERE THE TUMOR IS, YOU
19 CAN USE A NEEDLE TO DO THE BIOPSY. AND THEY BOTH TOLD YOU
20 THAT THAT DIDN'T HAPPEN IN THIS CASE, BECAUSE THERE WAS NO
21 TUMOR ON THE X-RAY IN THE LUNG.

22 SO THEY ORDERED A BRONCHOSCOPY, WHICH IS THE
23 TECHNIQUE WHERE THEY PUT THE TUBE DOWN THE WINDPIPE. THEY

24 CAN LOOK AROUND AND SEE IF THEY SEE ANY ABNORMAL TISSUE OR
25 ANY LESIONS THAT THEY SUSPECT, OR TUMORS. THEY CAN TAKE A
26 BIOPSY, THEY CAN TAKE BRUSHINGS AND WASHINGS.

27 REMEMBER, DR. HAGEN AND DR. WARREN BOTH SAID THAT
28 SOMETIMES A SMALL CELL CANCER THAT'S IN THE LUNG ISN'T

0060

1 NECESSARILY IN THE AIRWAY, BUT IT'S ON IT OR AROUND IT IN A
2 WAY THAT IT PRESSES AND CREATES A MOUND. AND YOU CAN TAKE
3 THE BRUSH ON THIS SCOPE AND YOU CAN BRUSH OFF A PIECE OF
4 THAT MOUND AND LOOK AT IT UNDER THE MICROSCOPE TO SEE IF
5 THERE'S ANYTHING ABNORMAL THERE.

6 THE OPERATION RECORD IS 2794. THIS IS WHEN DR.
7 HAGEN GOT INVOLVED, DR. HAGEN AND DR. MASON. THE
8 PREOPERATIVE DIAGNOSIS IS "? HILAR MASS." THE
9 POSTOPERATIVE DIAGNOSIS IS "A SMALL CELL CARCINOMA."

10 AND REMEMBER, DR. HAGEN SAID THAT HE SIGNED THIS
11 REPORT, AT LEAST THIS MUCH OF IT (INDICATING). THIS
12 INFORMATION, SOME OF IT CAME FROM THE NURSES.

13 BUT WHAT HE AND DR. MASON DID WAS DICTATED A
14 REPORT OF THE PROCEDURE, AND THAT'S 2791. AND THE FIRST
15 THING THEY DID WAS A BIOPSY OR A BRONCHOSCOPY. AND THEY PUT
16 THE SCOPE -- DR. HAGEN TESTIFIED TO THIS -- IN THE AIRWAYS,
17 INCLUDING THE LEFT UPPER LOBE BRONCHUS. THAT'S THE AIRWAY
18 THAT IS INSIDE THE LUNG. IT'S SURROUNDED BY LUNG TISSUE.

19 THEY PUT THE SCOPE, ACCORDING TO DR. HAGEN,
20 ANYWHERE THEY WANTED TO GO. THEY DIDN'T HAVE ANY PROBLEM
21 SEEING THE THINGS THEY WANTED TO SEE. THEY DIDN'T SEE ANY
22 ENDOBRONCHIAL LESIONS, WHICH IS A LESION INSIDE THE AIRWAY.
23 THEY DIDN'T SEE ANY ABNORMAL LESIONS.

24 AND YOU REMEMBER THIS QUESTION ABOUT
25 INFLAMMATION. DR. HAGEN, AS DID DR. WARREN, SAID THAT'S NOT
26 THE KIND OF INFLAMMATION THAT WOULD MAKE A DOCTOR SUSPICIOUS
27 OF IT BEING A TUMOR OR A CANCER. SO THEN THEY FINISHED THE
28 BRONCHOSCOPY AND DID THE PROCEDURE CALLED THE MEDIASTINOTOMY

0061

1 OR THE MEDIASTINOSCOPY.

2 AND DR. HAGEN TESTIFIED ABOUT THIS. THEY
3 ACTUALLY HAD TO PUSH THE LUNG ASIDE WITH THE SCOPE AND THEY
4 TOOK THE BIOPSY FROM THE TUMOR. AND WHAT DR. HAGEN SAID WAS
5 WITH THE SCOPE HE COULD SEE THAT THERE WAS A SPACE -- ABOUT
6 A CENTIMETER IS WHAT HE SAID, WHICH IS ALMOST A HALF AN
7 INCH. HE MIGHT HAVE EVEN SAID IT WAS TWO CENTIMETERS -- A
8 SPACE BETWEEN THE TUMOR AND THE BRONCHUS.

9 IN THE BODY, YOU CAN SEE -- I WILL SHOW YOU A
10 PICTURE IN A MINUTE -- A SPACE BETWEEN WHERE THE TUMOR WAS
11 AND WHERE THE AIRWAY WAS. AND REMEMBER, DR. HAMMAR SAID
12 SOMETIMES THESE TUMORS GROW ON THE AIRWAY AND GROW OUT.

13 THAT WASN'T WHAT DR. HAGEN DESCRIBED IN THIS
14 CASE. SO THEY TOOK A PIECE OF THAT TUMOR USING THIS
15 TECHNIQUE CALLED THE MEDIASTINOTOMY.

16 LET ME JUST SAY SOMETHING ABOUT BRONCHOSCOPY
17 BEFORE I MOVE ON. IN THE SAME MEDICAL JOURNAL ARTICLE,
18 PLAINTIFF'S 21-5 THAT MS. CHABER MENTIONED EARLIER THIS
19 MORNING WHERE DR. OCHSNER AND DEBAKEY TALKED ABOUT THEIR
20 PREDICTIONS ABOUT CANCER AND SMOKING, REMEMBER THEY TALKED
21 ABOUT IT BEING UNUSUAL TO FIND A TUMOR IN THE LUNG THAT YOU
22 CAN'T SEE ON X-RAY.

23 AND THEY POINT OUT THAT SPUTUM CYTOLOGY BECOMES A
24 VALUABLE DIAGNOSTIC PROCEDURE, AND THAT IN 70 PERCENT OF
25 THEIR CASES, 68 PERCENT OF THEIR CASES, THE SPUTUM CYTOLOGY
26 WAS POSITIVE.

27 AND THEY ALSO TALKED ABOUT USING BRONCHOSCOPY TO
28 DIAGNOSE LUNG CANCER. THAT'S JUST EVEN IN 1952 PEOPLE WERE

0062
1 TALKING ABOUT THAT TECHNIQUE. BUT THE BRONCHOSCOPY, AS YOU
2 HEARD, WAS AN EXAMINATION OF THE INSIDE BRANCHES OF THE
3 BRONCHIAL TREE, WHICH IS THE WINDPIPE AND THE AIRWAYS. IT'S
4 HOW YOU OBTAIN TISSUE AND CELLS TO DIAGNOSE BRONCHOGENIC
5 CARCINOMA, CANCER IN THE BRONCHUS.

6 AND REMEMBER THE MEDICAL TEXTBOOK THAT ALL THE
7 DOCTORS READ -- AND SOME OF THEM DISAGREED WITH IT -- BUT
8 THEY ALL DIDN'T DOUBT WHAT WAS SAID IN THE CHAPTER ON SMALL
9 CELL CARCINOMA. DR. DEVITA, WHO WROTE THE TEXTBOOK ON
10 CANCER: PRINCIPLES AND PRACTICES OF ONCOLOGY, AND WHO
11 POINTS OUT THAT IN THE STUDIES THEY REVIEWED:

12 "BRONCHOSCOPY WILL REVEAL EVIDENCE OF CANCER IN
13 MORE THAN 90 PERCENT OF PATIENTS WITH SMALL CELL
14 CARCINOMA OF THE LUNG."

15 IN THIS CASE, THE BRONCHOSCOPY DID NOT
16 DEMONSTRATE CANCER. IT DIDN'T DEMONSTRATE ANY
17 ABNORMALITIES. THE BIOPSY WAS DONE BY A PATHOLOGIST -- THIS
18 IS 2792 -- WHERE IT WAS DIAGNOSED AS A SMALL CELL
19 CARCINOMA. NOT SMALL CELL CARCINOMA OF THE LUNG, SMALL CELL
20 CARCINOMA.

21 AND THEN REMEMBER, DR. WARREN TESTIFIED ABOUT THE
22 X-RAYS AND ABOUT THE CT SCANS. AND A COUPLE OF THE THINGS
23 THAT HE DESCRIBED. HE DESCRIBED HOW THIS X-RAY AND THIS
24 DRAWING RELATE TO EACH OTHER (INDICATING). HE DESCRIBED
25 THAT TUMOR AS BEING A LOBULATED OR A SMOOTH-MARGINED TUMOR.

26 REMEMBER WHEN DR. FEINGOLD WAS HERE, HE TOLD US
27 ABOUT CANCER BEING CALLED CANCER BECAUSE IT'S THE LATIN WORD
28 FOR CRAB. IT GROWS IN A BUNCH OF DIFFERENT DIRECTIONS.

0063
1 THIS TUMOR DIDN'T HAVE JAGGED EDGES GROWING IN DIFFERENT
2 DIRECTIONS. IT HAD A SMOOTH MARGIN.

3 AND THAT'S WHAT DR. WARREN SAID IS WHAT YOU WOULD
4 EXPECT TO FIND IN A TUMOR THAT IS BEING BOUND BY SOMETHING
5 OR ENCAPSULATED IN SOMETHING. AND IT'S DEFINITELY OUTSIDE
6 THE LUNG. AND THE QUESTION IS WHAT COULD BE ENCAPSULATING
7 IT? WHAT IS LOBULAR IN SHAPE AT THAT POINT IN THE BODY?

8 ONE OF THE THINGS DR. WARREN SAID WAS IT COULD BE
9 RESIDUAL THYMIC GLAND, WHICH THAT IS ABOUT WHERE IT STAYS IN
10 THE BODY. BY THE TIME YOU ARE AN ADULT, IT COULD BE UP IN
11 YOUR NECK, IT COULD BE DOWN IN THE DIAPHRAGM, BUT IT
12 INVOLUTES. IT GOES AWAY THROUGHOUT YOUR LIFE.

13 BUT THE FACT THAT YOU CAN OR CAN'T SEE IT ON THE
14 X-RAY DOESN'T MEAN THAT THE TUMOR COULD OR COULDN'T START
15 THERE. THAT'S NOT THE ISSUE. BECAUSE THE QUESTION IS WHERE
16 IN THIS PART OF THE BODY COULD THAT THYMIC TISSUE BE, THE
17 FAT TISSUE?

18 REMEMBER, THEY TALKED ABOUT IT COULD BE
19 ANYWHERE. REMEMBER, THEY SAID -- DR. HENSLEY SAID THAT PART
20 OF THE PATHOLOGY SPECIMEN, THE BIOPSY IN THIS CASE HAD FAT
21 TISSUE ATTACHED AND IT DIDN'T HAVE LUNG TISSUE ATTACHED TO
22 IT.

23 SO YOU HAVE A SMOOTH-MARGINED TUMOR DOING
24 SOMETHING THAT YOU WOULDN'T EXPECT A CANCER THAT HAS STARTED
25 IN THE LUNG TO DO, AND THAT'S FOLLOWING A BOUNDARY
26 (INDICATING). AND DR. WARREN EXPLAINED THAT IT'S FOLLOWING
27 THE BOUNDARY OF THIS -- THIS IS ONE OF THE ARTERIES -- AND
28 THAT IT'S NOT BEHAVING THE WAY YOU WOULD EXPECT A CANCER TO

0064

1 BEHAVE THAT STARTED IN THE LUNG.

2 BECAUSE HE POINTED OUT THESE LITTLE GREEN LYMPH
3 NODES (INDICATING), THESE LITTLE GREEN DOTS ARE LYMPH NODES,
4 AS DID DR. HENSLEY AND EVEN DR. FEINGOLD AND DR. HAMMAR.
5 THEY TALKED ABOUT LYMPH NODE INVOLVEMENT. WHEN CANCER
6 STARTS IN THE LUNG, IT SPREADS TO THE LYMPH NODES AND GOES
7 UP THE WINDPIPE ALONG THESE LYMPH NODES (INDICATING). THERE
8 WAS NO CANCER IN ANY OF THE LYMPH NODES IN THIS CASE. THERE
9 WAS NO SPREAD.

10 WHEN EVERYBODY TALKED ABOUT A MASSIVE SPREAD TO
11 THE MEDIASTINUM, WHAT THEY MEAN BY "MASSIVE" IS NOT BIG.
12 THEY MEAN TO A NUMBER OF THE LYMPH NODES. THAT IS WHAT DR.
13 HENSLEY SAID, AND DR. HAMMAR SAID IT EARLIER IN THE CASE.
14 BUT IF THIS WERE A LUNG CANCER, YOU WOULD HAVE EXPECTED TO
15 SEE THESE LYMPH NODES INVOLVED, BECAUSE THAT'S WHERE CANCER
16 THAT STARTS IN THE LUNG SPREADS TO.

17 REMEMBER, DR. HENSLEY OPERATED ON HUNDREDS OF
18 PEOPLE. HE'S SEEN LUNG TUMORS. HE'S SEEN TUMORS THAT START
19 IN THE LUNG. AND HE'S NEVER SEEN A CANCER THAT STARTED IN
20 THE LUNG THAT YOU COULDN'T FIND ON X-RAY, COULDN'T FIND ON
21 BRONCHOSCOPY OR HADN'T SPREAD TO THE LYMPH NODES.

22 AND IF YOU LOOK AT THE REST OF THE MEDICAL
23 RECORDS. THIS IS EXHIBIT 2018, WHICH DR. HAGEN TOLD US
24 ABOUT. THEY HAD A CONFERENCE, THE DOCTORS WHO WERE INVOLVED
25 IN THIS GET-TOGETHER, AND TALK ABOUT THE PATIENTS THEY ARE
26 WORKING ON.

27 THIS WAS A STAFF CONFERENCE (INDICATING) THEY HAD
28 WITH RESPECT TO MS. HENLEY. DR. YOUN SIGNED IT, PREPARED

0065

1 IT. DR. HAGEN WAS THERE. REMEMBER, HE TOLD US THAT IS
2 WHERE THEY TALK ABOUT THE CASE. AND IT DOESN'T SAY ANYTHING
3 IN HERE ABOUT THE CANCER BEING IN THE LUNG.

4 DR. YOUN THEN WENT ON TO FILL OUT WHAT WAS CALLED
5 THE DISCHARGE RECORD. THIS IS 2793. THIS IS THE SAME DR.
6 YOUN WHO WAS AT THE STAFF CONFERENCE WITH DR. HAGEN. AND HE
7 COLLECTS ALL THE INFORMATION, SUMMARIZES IT, POINTS OUT THAT
8 THERE HAD BEEN CHEST X-RAYS, CT SCANS, BRONCHOSCOPY,
9 MEDIASTINOSCOPY. "NO PRIMARY IDENTIFIED ON CHEST CT OR
10 INTRAOP."

11 DR. HAGEN TOLD US WHAT THAT MEANS. THEY DIDN'T
12 FIND THE PRIMARY, WHERE THE CANCER STARTED GROWING, ON THE
13 CHEST CT SCANS OR DURING THE OPERATION. THEY DID AN X-RAY
14 AFTERWARDS TO MAKE SURE THAT THERE WASN'T A COLLAPSED LUNG,
15 AND THEY DIDN'T SEE ANY INFILTRATES ON THE X-RAY. NOTHING
16 UNUSUAL IN THE X-RAY AT THAT POINT.

17 THEY DID AN MRI AND CT SCANS AND BONE SCAN,
18 REMEMBER, BECAUSE THEY WERE LOOKING TO SEE IF THE CANCER HAD
19 SPREAD TO OTHER PLACES. WHEN CANCER STARTS IN THE LUNG,
20 ESPECIALLY SMALL CELL CARCINOMA, IT OFTEN HAS ALREADY SPREAD
21 TO OTHER PLACES IN THE BODY WHERE IT CAN BE FOUND AT THE
22 TIME YOU DIAGNOSE IT; THE BRAIN, THE BONE, LIVER AND ADRENAL
23 GLANDS.

24 ALL THE DOCTORS WHO TESTIFIED AGREED WITH THAT.
25 AND EVERYBODY AGREED THAT IN THIS CASE, THE CANCER
26 FORTUNATELY WASN'T FOUND IN ANY OF THOSE PLACES.

27 NOW, THE OTHER INTERESTING THING ABOUT THE CASE
28 IS THIS QUESTION OF STATISTICS. AND GEE, YOU KNOW, THYMIC

0066

1 CANCER IS SO RARE, LUNG CANCER IS SO COMMON, DOESN'T THAT
2 MEAN THIS HAD TO HAVE BEEN A CANCER THAT STARTED IN THE

3 LUNG?

4 YOU HEARD DR. HENSLEY SAY THAT DOCTORS DON'T USE
5 STATISTICS TO MAKE DIAGNOSES OR TO DETERMINE WHERE A CANCER
6 STARTED. THEY USE ANATOMY, THEY USE X-RAYS, THEY USE CT
7 SCANS. THEY PUT ALL THIS TOGETHER.

8 YOU HEARD DR. MENA SAY THAT BASED ON THE
9 INFORMATION HE HAD AT THE TIME, HE THOUGHT THIS MIGHT BE OR
10 PROBABLY WAS A LUNG CANCER. BUT HE WOULD HAVE TREATED IT
11 THE SAME WAY. YOU HEARD DR. WARREN AND DR. RYMER
12 CROSS-EXAMINED ABOUT THYMIC CARCINOMA WITH THE ARTICLE
13 WRITTEN BY THOSE PROFESSORS FROM MIAMI.

14 AND THEY SAID: "IF YOU ARE GOING TO DIAGNOSE
15 THYMIC CARCINOMA, YOU SHOULD DO IT IN RETROSPECT," WHICH IS
16 IN HINDSIGHT, "AND YOU SHOULD DO IT BY EXCLUDING LUNG
17 CANCER," WHICH IS EXACTLY WHAT DR. WARREN AND DR. HENSLEY
18 AND DR. RYMER DID.

19 THEY HAD THE LUXURY OF SOMETHING THAT DR. MENA
20 AND DR. HAGEN DIDN'T HAVE AT THE TIME. THEY HAD TIME TO
21 LOOK BACK, COLLECT THE INFORMATION AND COMPARE IT AND
22 CONTRAST IT TO WHAT THEY KNOW ABOUT CANCERS, SMALL CELL
23 CANCERS, THYMIC CANCERS AND LUNG CANCERS.

24 DR. MENA SAID THAT IF THIS WAS A CANCER THAT
25 STARTED IN MS. HENLEY'S LUNG, IT WAS DIFFERENT THAN 95
PERCENT OF EVERY LUNG CANCER HE'S EVER TREATED.

27 YOU COULD ALMOST MAKE THE SAME ARGUMENT THAT THE
28 ONLY THING RARER THAN THYMIC CARCINOMA, SMALL CELL CARCINOMA

0067

1 OF THE THYMUS, WOULD BE A SMALL CELL CARCINOMA OF THE LUNG
2 THAT YOU COULDN'T FIND ON AN X-RAY, YOU COULDN'T FIND ON A
3 CT SCAN, YOU COULDN'T FIND ON A BRONCHOSCOPY AND IT HADN'T
4 SPREAD TO THE LYMPH NODES. YOU CAN COMPARE AND CONTRAST
5 INFORMATION LIKE THIS.

6 THE OTHER THING, REMEMBER, THAT DR. WARREN SAID
7 TOO IS THE WAY THIS CANCER HAD SPREAD WAS UNUSUAL, BECAUSE
8 WHEN LUNG CANCER SPREADS, THEY IMPINGE ON THE LARYNGEAL
9 NERVE, THEY PRODUCE SUPERIOR VENA CAVA SYNDROME, TWO THINGS
10 THAT WEREN'T DEMONSTRATED ON CHEST X-RAY OR CT SCAN IN MS.
11 HENLEY'S CASE.

12 THE DOCTORS WHO TESTIFIED IN THE CASE TALKED A
13 LOT ABOUT TYPICAL LUNG CANCERS OR SMALL CELL CARCINOMA OF
14 THE LUNG AND FREQUENCIES AND THOSE KINDS OF THINGS. AND
15 WHEN YOU HEARD WORDS LIKE "TYPICAL," AND YOU HEARD WORDS
16 LIKE "USUALLY," AND YOU HEARD WORDS LIKE "FREQUENTLY," THAT
17 ALL COMES FROM THESE STATISTICS.

18 THESE DOCTORS WHO COLLECT THIS INFORMATION
19 PUBLISH IT IN MEDICAL JOURNALS AND MEDICAL BOOKS AND COMPARE
20 AND CONTRAST THESE THINGS. AND MOST SMALL CELL CARCINOMA OF
21 THE LUNG "IS A CENTRALLY LOCATED ENDOBRONCHIAL LESION IN THE
22 MAIN STEM OR LOW BAR BRONCHUS."

23 AND DR. HAGEN AGREED WITH THAT, DR. HORN AGREED
24 WITH THAT. I THINK EVEN DR. FEINGOLD AGREED WITH THAT.
25 WHAT THAT MEANS IS YOU FIND THE LESION, THE TUMOR INSIDE THE
26 AIRWAY, EITHER IN THE MAIN STEM PART OF THE BRONCHUS OR THE
27 LOW BAR BRONCHUS. AND WHEN DR. HAGEN DID THE BRONCHOSCOPY,
28 HE WAS IN THE MAIN STEM AND THE LOW BAR BRONCHUS. HE SAID

0068

1 THAT IN MS. HENLEY'S CASE, THERE WAS NOT A CENTRALLY LOCATED
2 ENDOBRONCHIAL LESION FOUND.

3 THE DOCTORS ALL TESTIFIED THAT LUNG CANCER
4 USUALLY PRESENTS ITSELF ON CHEST X-RAYS OR CT SCANS WITH
5 MULTIPLE HILAR AND MEDIASTINAL LYMPH NODE ENLARGEMENT.

6 THAT'S THE WORD "ADENOPATHY." IF YOU LOOK AT DR. WARREN'S
7 DRAWING, THE GREEN DOTS ARE THE LYMPH NODES (INDICATING) AND
8 THEY ARE IN THE MEDIASTINAL AND HILAR REGION.

9 AND IN THIS CASE, IF YOU LOOK BACK AT THE CT
10 REPORT, WHICH IS EXHIBIT NO. 2790, THERE IS NO ADENOPATHY
11 INDICATED. "NO ADENOPATHY IS EVIDENT ELSEWHERE." NO
12 INVOLVEMENT OF THE LYMPH NODES, WHICH IS WHAT THE DOCTORS,
13 EVEN DOCTORS MS. CHABER CALLED SAID: "YOU USUALLY WILL FIND
14 THAT IN A SMALL CELL CARCINOMA THAT STARTED IN THE LUNG."

15 SPUTUM CYTOLOGY WE TALKED ABOUT IN THIS CASE. IN
16 THIS CASE, IT WAS NEGATIVE, SPUTUM CYTOLOGY AND
17 BRONCHOSCOPY. AND THESE ARE THE WORDS THAT EACH OF THE
18 DOCTORS USED. I THINK DR. HAMMAR SAID "OFTEN." DR. HORN
19 SAID "TYPICALLY" AT HIS DEPOSITION, REMEMBER, AND THEN IN
20 COURT WASN'T QUITE SO SURE IT WAS TYPICAL. DR. FEINGOLD
21 SAID "FREQUENTLY." DR. WARREN I THINK SAID "USUALLY." AND
22 THE TEXTBOOK, REMEMBER, SAID: "90 PERCENT REVEALS EVIDENCE
23 OF A LESION."

24 REMEMBER, THIS IS WHAT DR. HORN TALKED ABOUT:
25 "IF YOU DON'T FIND THE TUMOR IN THE BRONCHUS, IN THE
26 AIRWAY, YOU FIND COMPRESSION," WHICH IS TO SAY THERE IS
27 TUMOR SOMEWHERE ELSE THAT IS PRESSING ON THE BRONCHUS AND
28 MAKING IT SMALL, SO YOU CAN'T GET THE SCOPE IN THERE.

0069

1 "OR," HE SAID, "YOU HAVE MOUNDING." THE TUMOR
2 GROWS ON THE SIDE OF BRONCHUS AND PUSHES IT. IT HUMPS UP.
3 THAT YOU CAN SEE ON THE BRONCHOSCOPY. IT NARROWS. YOU FIND
4 ABNORMALITIES. AND THAT WAS DOCTOR DR. HORN'S WORD. THE
5 SCOPE GETS "STUCK."

6 NONE OF THAT IN THIS CASE. DR. HAGEN SAID THE
7 SCOPE WENT EVERYWHERE HE WANTED IT TO GO. HE DIDN'T SEE ANY
8 ABNORMALITIES, NO COMPRESSION, NO MOUNDING, NO NARROWING.
9 (WRITING ON BOARD)

10 DR. HAGEN AND THE OTHER DOCTORS WHO TESTIFIED IN
11 THE PLAINTIFF'S CASE ALL AGREED THAT MOST OF THE TIME WHEN
12 THEY DIAGNOSE LUNG CANCER IN SOMEBODY, A CANCER THAT STARTED
13 IN THE LUNG, THEY DO IT BASED ON A BIOPSY OF TISSUE TAKEN
14 FROM INSIDE THE LUNG. AND THAT, AS WE SAID, DIDN'T HAPPEN
15 IN THIS CASE. THERE WAS NO BIOPSY OF LUNG TISSUE IN THIS
16 CASE. (WRITING ON BOARD)

17 "MOST OF THE TIME, A SMALL CELL CARCINOMA THAT
18 HAS STARTED IN THE LUNG HAS SPREAD TO OTHER PARTS
19 OF THE BODY AT THE TIME OF DIAGNOSIS."

20 AND THIS WAS PART OF DR. RYMER'S TESTIMONY. AND
21 EVEN DR. MENA SAID SOME OF THE SAME KINDS OF THINGS ABOUT
22 THAT. AND IN THIS CASE, THERE IS NO -- THERE IS NO SPREAD.
23 SO REMEMBER, YOU GOT AN INSTRUCTION YESTERDAY

24 THAT SAYS:

25 "IN RESOLVING CONFLICTS IN TESTIMONY OF EXPERT
26 WITNESSES, YOU HAVE TO WEIGH THE OPINIONS."

27 AND I DON'T THINK MS. CHABER SUGGESTED THAT
28 BECAUSE THESE TYPES OF WITNESSES HAVE TO BE PAID FOR THEIR

0070

1 TIME, THEY SHOULDN'T BE BELIEVED. I'M NOT SUGGESTING THAT
2 EITHER. BUT WHAT I'M SUGGESTING IS WHEN YOU THINK ABOUT
3 THEIR TESTIMONY, YOU NEED TO ASK YOURSELF HOW THEY DEVELOP
4 THEIR EXPERTISE? WAS IT A LIFETIME OF DIAGNOSING DISEASE?
5 WAS IT HUNDREDS OR A THOUSAND SURGERIES? WAS IT BECAUSE
6 THEY'VE TREATED THESE KINDS OF THINGS BEFORE IN THE PAST?
7 AND IS IT BECAUSE THEY HAVE BEEN INVOLVED IN THIS KIND OF
8 THING?

9 REMEMBER DR. HAMMAR, THE PATHOLOGIST, WHO CAME
10 HERE, AND HE WROTE THE BIG FAT TEXTBOOK. REMEMBER IN THE
11 CHAPTER ON SMALL CELL CARCINOMA, A LOT OF THE WORK HE CITES,
12 THE RESEARCH HE CITES WAS WRITTEN BY DR. WARREN. SO, YOU
13 KNOW, ALL OF THESE DOCTORS CAN LOOK AT THE SAME INFORMATION
14 AND COME TO REACH DIFFERENT OPINIONS OR FORM DIFFERENT
15 JUDGMENTS.

16 BUT WHEN YOU HAVE TO DECIDE WHETHER THE PLAINTIFF
17 HAS PROVED TO YOU THAT THIS WAS A CANCER THAT STARTED IN THE
18 LUNG, YOU SHOULD COMPARE AND CONTRAST WHAT THEY SAY ABOUT
19 WHAT THEY TYPICALLY OR USUALLY FIND IN THESE TYPES OF
20 CASES.

21 AND NOTHING ABOUT THIS CASE IS WHAT THEY
22 TYPICALLY OR USUALLY FIND IN A PATIENT WHO HAS A CANCER THAT
23 STARTS GROWING IN THE LUNG. AND EACH OF THEM SAID THAT --
24 EACH OF THE DOCTORS THAT CAME TO THE DEFENSE CASE SAID THAT
25 THEY WEREN'T NECESSARILY SUGGESTING ANYBODY DID ANYTHING
26 WRONG OR THEY DIDN'T HAVE DISAGREEMENT WITH THE TREATMENT,
27 BECAUSE THE TREATMENT WOULDN'T HAVE CHANGED. ONCE YOU
28 FIGURED OUT THIS WAS A TUMOR AND WHERE IT WAS IN MS.

0071 1 HENLEY'S BODY, AND ONCE YOU FIGURED OUT YOU COULDN'T OPERATE
2 ON IT, IT WAS GOING TO BE TREATED THE SAME WAY.

3 SO IT'S NOT A QUESTION OF SAYING IT HAS TO BE
4 LUNG CANCER BECAUSE THEY TREATED IT AS LUNG CANCER. IF THEY
5 HAD DIAGNOSED THIS AS A SMALL CELL CARCINOMA OF UNKNOWN
6 ORIGIN, THEY WOULD HAVE TREATED IT THE SAME WAY. IF THEY
7 HAD DIAGNOSED IT AS A THYMIC CARCINOMA, THEY WOULD HAVE
8 TREATED IT THE SAME WAY.

9 AND TO WRAP THIS PART OF MY DISCUSSION UP,
10 REMEMBER WHEN DR. HAGEN WAS HERE -- OH, BY THE WAY, AS
11 MS. CHABER TOLD YOU EARLIER, IF YOU LOOK AT ALL THIS AND
12 SHRUG YOUR SHOULDERS AND SAY: "I CAN'T TELL WHICH IS
13 WHICH," THEN THE PLAINTIFF HASN'T PROVED HER CASE. SHE
14 HASN'T CARRIED HER BURDEN OF PROOF AND YOU HAVE TO RETURN A
15 VERDICT FOR THE DEFENDANT, TO PHILIP MORRIS.

16 THIS IS A QUESTION, THIS ISSUE OF LUNG CANCER,
17 THAT ARISES IN EVERY ONE OF THE VERDICT FORMS ON THE
18 CAUSATION QUESTIONS. YOU GET A QUESTION. IN VERDICT FORM
19 NO. 1, IT'S NO. 4. IN VERDICT FORM 4, IT'S NO. 2. IN
20 VERDICT FORM NO. 3, IT'S NO. 4, AND IN 4, 5, 6 AND 7,
21 THERE'S A QUESTION ABOUT CAUSE. AND IF THE PLAINTIFF HASN'T
22 PROVED TO YOU THAT MS. HENLEY HAS A TUMOR THAT STARTED IN
23 HER LUNG, THEN SHE HASN'T PROVED THAT ANYTHING ELSE THAT
24 HAPPENED OR ANYTHING ELSE WITH RESPECT TO THE EVIDENCE IN
25 THIS CASE CAUSED ANY INJURY TO HER.

26 SO YOU'D HAVE TO ANSWER THOSE QUESTIONS NO. AND
27 THAT'S ONE OF THE REASONS YOU CAN ANSWER THOSE QUESTIONS OR
28 THAT QUESTION NO. THERE ARE OTHER REASONS -- AND WE'LL TALK

0072 1 ABOUT THOSE -- WHY YOU CAN DECIDE THAT MS. HENLEY'S PROOF
2 DOESN'T ESTABLISH CAUSE. THE COURT HAS DEFINED IT FOR YOU,
3 BUT THAT IS ONE OF THE REASONS.

4 AND JUST AS MS. CHABER SAID, NINE OF YOU HAVE TO
5 AGREE ON THE ANSWER TO THE QUESTION, BUT YOU CAN GET THERE
6 FOR DIFFERENT REASONS, SO LONG AS YOU ALL AGREE THAT THE
7 PLAINTIFF HASN'T PROVED THE ISSUE OF CAUSE AS IT'S DESCRIBED
8 IN THE SPECIAL VERDICT.

9 BUT REMEMBER DR. HAGEN. AND WE HAD THE
10 DISCUSSION ABOUT THE -- WE STARTED TALKING ABOUT AN
11 INVISIBLE CAT AND HE REMINDED ME THAT AT HIS DEPOSITION, I

12 HAD ASKED HIM, YOU KNOW, "HOW CAN YOU PROVE THAT SOMEBODY
13 HAS A CANCER IN THEIR LUNG IF YOU DON'T HAVE A PICTURE OF
14 IT? IF YOU DON'T HAVE A BIOPSY FROM THE LUNG? IF IT'S NOT
15 SOMETHING THAT ANYBODY HAS SEEN?"

16 AND HE GAVE ME THE EXAMPLE OF THE EMPTY CHAIR.
17 AND HE SAID: "IF YOU TOLD ME THERE WAS AN INVISIBLE CAT IN
18 THIS EMPTY CHAIR, I COULDN'T DISPROVE IT. IT WOULD BE
19 IMPOSSIBLE FOR ME TO PROVE THERE IS NOT AN INVISIBLE CAT IN
20 THAT CHAIR."

21 BUT REMEMBER, IN COURT WE KIND OF TURNED IT
22 AROUND. AND I ASKED HIM, I SAID: "BUT IF I WERE TO TELL
23 YOU THAT YOUR PARTNER, DR. MASON, WAS SITTING IN THAT CHAIR,
24 THERE ARE A NUMBER OF WAYS I COULD PROVE IT TO YOU, AREN'T
25 THERE?" AND HE AGREED.

26 I SAID ONE THING I COULD DO IS TAKE A PICTURE OF
27 HIM -- TAKE A PICTURE OF DR. MASON SITTING IN THE CHAIR AND
28 PROVE TO DR. HAGEN THAT DR. MASON WAS IN THE CHAIR. IN A

0073

1 WAY, THAT IS WHAT THE CT SCANS AND THE X-RAYS ARE LIKE.
2 THEY TOOK A PICTURE, TWO-DIMENSIONAL AND EVEN THREE-
3 DIMENSIONAL PICTURE OF MS. HENLEY'S LUNG. THERE IS NO LUNG
4 CANCER. THERE IS NOT CANCER IN THAT LUNG.

5 I SAID TO DR. HAGEN: "THE NEXT THING I CAN DO
6 WOULD BE TO COLLECT THINGS FROM DR. MASON, ARTICLES OF
7 CLOTHING OR THINGS THAT HE CARRIES WITH HIM THAT YOU WOULD
8 IDENTIFY AS DR. MASON'S THAT MIGHT HELP PROVE TO YOU HE WAS
9 SITTING IN THAT CHAIR."

10 AND AGAIN, IN THIS CASE IT WOULD BE A BIOPSY.
11 YOU COULD TAKE A BIOPSY OF SOMETHING FROM INSIDE THE LUNG,
12 LOOK AT IT AND SAY "IT'S CANCER," AND THAT WOULD HELP PROVE
13 THAT THERE WAS CANCER IN MS. HENLEY'S LUNG. THEY DON'T HAVE
14 THAT. THERE ISN'T THAT KIND OF EVIDENCE IN THIS CASE.

15 AND FINALLY I SAID TO DR. HAGEN: "I COULD ALSO
16 DESCRIBE WHO IS SITTING IN THAT CHAIR TO YOU IN A WAY THAT
17 WOULD ALLOW YOU TO COMPARE AND CONTRAST WHAT I WAS
18 DESCRIBING TO YOU WITH WHAT DR. MASON TYPICALLY OR
19 FREQUENTLY IS KNOWN TO YOU TO LOOK LIKE." AND HE AGREED
20 WITH THAT.

21 AND THAT'S EXACTLY WHAT WE HAVE DONE HERE IS WE
22 HAVE TAKEN EVERYTHING THAT THE DOCTORS IN THE CASE,
23 INCLUDING WHAT THE DOCTORS WHO TESTIFIED IN THE PLAINTIFF'S
24 CASE HAVE SAID ABOUT CANCER THAT STARTS IN THE LUNG, AND
25 COMPARED IT AND CONTRASTED IT TO WHAT WE KNOW ABOUT MS.
HENLEY FROM THE MEDICAL RECORDS AND FROM THE TESTIMONY. AND
IT DOESN'T COMPARE WITH THE TYPE OF CANCER THAT PEOPLE HAVE
SEEN OR DESCRIBED AS TYPICALLY STARTING IN THE LUNG.

0074

1 THE NEXT THING I WANT TO TALK ABOUT HAS TO DO
2 WITH THE ISSUE OF NEGLIGENCE AND THE ISSUE OF PHILIP MORRIS'
3 CONDUCT. AND I'M GOING TO GO THROUGH IT IN SOME DETAIL, THE
4 EVIDENCE, BUT I WANT TO START WITH SOMETHING SIMPLE. IT'S
5 NOT THE ANSWER TO THE WHOLE ISSUE, BUT IT'S SOMETHING YOU
6 OUGHT TO CONSIDER WHEN YOU DECIDE WHETHER PHILIP MORRIS
7 ACTED REASONABLY OR WHEN YOU TRY TO DECIDE WHAT KIND OF
8 STATE OF MIND DO PEOPLE AT PHILIP MORRIS HAVE OVER THE TIME
9 PERIODS INVOLVED IN THIS LAWSUIT. THAT IS ONE OF THE THINGS
10 MS. CHABER IS GOING TO ASK YOU TO DO.

11 YOU HEARD DEPOSITION TESTIMONY THAT WAS READ TO
12 YOU BY MS. CHABER FROM A DR. OSDENE, WHO WAS THE DIRECTOR OF
13 RESEARCH FOR A PERIOD OF TIME AT PHILIP MORRIS. YOU SAW A
14 VIDEO CLIP OF A DOCTOR -- OF MR. BOWLING, WHO WAS AN

15 EXECUTIVE AT THE COMPANY. YOU HEARD DEPOSITION TESTIMONY
16 FROM A DR. WAKEHAM, WHO WAS VICE PRESIDENT OF RESEARCH FOR A
17 PERIOD OF TIME. AND YOU HEARD TESTIMONY HERE IN COURT FROM
18 JIM MORGAN, WHO WAS A BUSINESSMAN AND EXECUTIVE OF THE
19 COMPANY.

20 AND YOU HEARD THAT EACH OF THOSE PEOPLE SMOKED.
21 AND IF THESE PEOPLE WERE ALL ACTING WITH THE KIND OF FRAUD
22 AND THE KIND OF MALICE AND THE KIND OF OPPRESSION MS. CHABER
23 WANTS YOU TO BELIEVE THEY POSSESSED, IF SHE WANTS YOU TO
24 BELIEVE THAT THEY HAD SOME KIND OF KNOWLEDGE THAT OTHER
25 PEOPLE DIDN'T HAVE OR KNEW THINGS THAT WEREN'T ACTUALLY EVEN
26 WRITTEN ON THE SIDES OF PACKAGES AT SOME POINT IN TIME, WHY
27 WOULD THEY HAVE SMOKED CIGARETTES? YOU HEARD MR. BOWLING
28 SAY THAT HIS WIFE SMOKES CIGARETTES.

0075

1 IT'S NOT THE ANSWER TO THE QUESTION, BUT IT'S
2 SOMETHING YOU NEED TO THINK ABOUT WHEN YOU PUT EVERYTHING
3 TOGETHER. NOT JUST, YOU KNOW, WORDS OR SENTENCES OUT OF
4 PIECES OF PAPER OR DOCUMENTS. I MEAN, TO JUDGE THE CONDUCT
5 OF PHILIP MORRIS, YOU HAVE TO LOOK AT WHAT THEY DID. AND TO
6 JUDGE THEIR STATE OF MIND, YOU HAVE TO LOOK AT WHAT THEY
7 DID, WHAT THEY SAID. AND IT'S FAIR TO CONSIDER SOME OF THE
8 THINGS YOU READ IN THESE DOCUMENTS.

9 BUT WHAT'S NOT FAIR IS TO TAKE A FEW WORDS OR A
10 FEW SENTENCES OUT OF CONTEXT OR OUT OF A PIECE OF PAPER AND
11 TRY TO USE IT TO BROADLY DESCRIBE WHAT THESE PEOPLE WERE
12 THINKING OVER THIS PERIOD OF TIME, OR WHAT THEY WERE DOING.
13 YOU HAVE TO LOOK AT WHAT THEY DID, YOU HAVE TO LOOK AT WHAT
14 THEY SAID, YOU HAVE TO LOOK AT OTHER THINGS THAT COMPARE AND
15 CONTRAST AND PUT THOSE THINGS INTO CONTEXT.

16 AND THAT IS WHAT I WANT TO DO FOR A FEW MINUTES.
17 NOW, I WANT TO START ALMOST LIKE MS. CHABER DID, BACK IN THE
18 '50S, AND I WANT TO PUT TOGETHER A LITTLE TIME LINE THAT WE
19 CAN USE TO PUT THIS EVIDENCE INTO CONTEXT. BECAUSE YOU
20 HEARD ALMOST FROM THE FIRST DAY OF THE CASE THAT THERE ARE
21 TWO THINGS GOING ON HERE. ONE IS JUDGMENT ABOUT THIS
22 EVIDENCE. WHAT DOES IT MEAN? AND THE OTHER THING IS
23 CONDUCT. WHAT DID PHILIP MORRIS OR OTHERS DO ABOUT IT?

24 AND DR. DAVIS, AGAIN THE FIRST WITNESS IN THE
25 CASE, TOLD YOU THAT DETERMINING WHETHER SMOKING CAUSES
26 CANCER OR ANYTHING CAUSES CANCER IS A MATTER OF JUDGMENT.
27 AND YOU HAVE TO MAKE THAT JUDGMENT BASED ON A NUMBER OF
28 DIFFERENT FACTORS, AND IT DEPENDS IN PART UPON FOR WHAT

0076

1 PURPOSE YOU'RE MAKING THAT JUDGMENT.

2 AND THE SURGEON GENERAL'S REPORT IN 1964, WHICH
3 EXCERPTS ARE IN AS DEFENDANT'S 2828, HE SPENDS THREE AND A
4 HALF PAGES DEFINING HOW YOU MAKE THAT JUDGMENT. BUT BEFORE
5 I GET TO THAT, I WANT TO DO THIS. I WANT TO TALK ABOUT WHAT
6 HAPPENED AT VARIOUS POINTS IN TIME.

7 AND MS. CHABER ALREADY TOLD YOU ABOUT THE STUDY
8 IN 1950 WHERE WYNDR AND GRAHAM PUBLISHED WHAT THEY CALLED A
9 "RETROSPECTIVE EPIDEMIOLOGY STUDY." IT WAS A STUDY THAT
10 LOOKED BACKWARDS, AND WHERE THEY SUGGESTED THAT PEOPLE WHO
11 SMOKED DEVELOPED CANCER MORE OFTEN THAN PEOPLE WHO DIDN'T.
12 (WRITING ON BOARD)

13 IN 1952, I THINK SHE SAID DOLL AND HILL PUBLISHED
14 A SIMILAR TYPE OF STUDY, BUT ONE THAT LOOKED FORWARD,
15 BECAUSE PEOPLE THOUGHT THAT IF YOU ARE GOING TO USE
16 TECHNIQUES TO STUDY THINGS, IT WAS BETTER TO LOOK FORWARD
17 THAN BACKWARDS.

18 THE SKIN-PAINTING EXPERIMENTS ON THE MICE THAT
19 YOU HEARD A LITTLE BIT ABOUT WAS PUBLISHED IN 1953. SO UP
20 TO THIS POINT IN TIME (INDICATING), YOU HAVE PEOPLE WITH
21 SUSPICIONS ABOUT SMOKING YOU'VE HEARD A LOT ABOUT, YOU KNOW,
22 STARTING WITH KING JAMES AND GOING FORWARD. I WILL TALK
23 ABOUT THAT A LITTLE LATER.

24 BUT IT WASN'T REALLY UNTIL THE '50S THAT
25 SCIENTISTS STARTING USING TECHNIQUES AND APPLYING SCIENTIFIC
26 METHODS TO STUDY THE ISSUE. AND WHAT THEY FOUND WAS BASED
27 ON THESE EPIDEMIOLOGY STUDIES, PEOPLE WHO SMOKED WERE
28 DEVELOPING CANCER MORE OFTEN THAN PEOPLE WHO DIDN'T.

0077

1 THEY ALSO DID THESE EXPERIMENTS WITH THE MICE
2 THEY SPECIALLY BRED TO DEVELOP CANCER. THEY WERE PAINTED
3 WITH A LARGE AMOUNT OF THE CONDENSATE FROM TOBACCO SMOKE
4 THAT WAS COLLECTED AFTER SMOKING HUNDREDS OR THOUSANDS OF
5 CIGARETTES AND FOR A LONG PERIOD OF TIME AND THEN THEY
6 EXAMINED THEM TO SEE WHERE THEY DEVELOPED TUMORS. I'M GOING
7 TO TELL YOU WHAT THE PEOPLE WHO ACTUALLY DID THE EXPERIMENTS
8 SAID ABOUT THAT IN A MINUTE.

9 SO UP TO THIS POINT IN TIME (INDICATING), THAT IS
10 WHAT YOU HAVE. AND MS. CHABER SHOWED YOU ALREADY WHAT'S IN
11 EVIDENCE AS PLAINTIFF'S 31-B. AND THIS WAS AN ADVERTISEMENT
12 THAT RAN ONE TIME IN A NUMBER OF PAPERS THROUGHOUT THE
13 COUNTRY AND THERE WAS A SUGGESTION MADE THIS MORNING THAT
14 THIS SOMEHOW CREATED A WARRANTY OR A PROMISE TO MS. HENLEY.

15 AND WHEN YOU READ THE COURT'S INSTRUCTIONS, I
16 THINK YOU'LL CONCLUDE THAT -- AND YOU RECALL MS. HENLEY'S
17 TESTIMONY. SHE NEVER HEARD ABOUT THIS, NEVER READ ABOUT IT,
18 NEVER ACTED IN RELIANCE ON IT. IT'S NOT THE KIND OF THING
19 THAT IS DEFINED IN THOSE INSTRUCTIONS AS A PROMISE OR A
20 WARRANTY.

21 BUT BE THAT AS IT MAY, DR. POLLAY HAD TOLD YOU
22 THAT THERE REALLY WEREN'T ANY MISSTATEMENTS OF FACT IN THIS,
23 THAT THERE WERE SOME STATEMENTS OF OPINION AND THERE WERE
24 SOME DESCRIPTIONS OF THE REPORTS ON EXPERIMENTS WITH MICE,
25 GIVING WIDE PUBLICITY TO THE THEORY THAT SMOKING WAS SOMEHOW
LINKED WITH LUNG CANCER.

27 "THE EXPERIMENTS WERE NOT REGARDED AS CONCLUSIVE
28 IN THE FIELD OF CANCER RESEARCH, BUT THE

0078

1 COMPANIES BELIEVE THAT THEY SHOULD NOT BE
2 DISREGARDED OR DISMISSED."

3 SO WHAT THESE COMPANIES DID WAS THEY GOT TOGETHER
4 AND THEY FORMED AN ORGANIZATION TO SPONSOR RESEARCH. AND
5 THIS IS NOT -- THIS AGREEMENT -- THIS ORGANIZATION IS NOT
6 NECESSARILY OR EVEN LEGALLY EVIDENCE OF A CONSPIRACY TO DO
7 ANYTHING WRONG. THERE'S NOTHING WRONG WITH GETTING TOGETHER
8 TO DO THIS. IN FACT, THE COMPANIES TOLD -- IF YOU LOOK AT
9 DEFENDANT'S 2827 AND 2825, THIS ORGANIZATION WROTE A LETTER
10 TO THE JUSTICE DEPARTMENT OF THE UNITED STATES AND SAID --
11 ACTUALLY, THE JUSTICE DEPARTMENT WROTE THEM A LETTER AND
12 SAID:

13 "WE'VE SEEN YOUR AD. TELL US WHAT YOU CAN TELL
14 US ABOUT YOUR ORGANIZATION."

15 AND 2825 IS THE LETTER THAT WENT BACK THAT SAID:

16 "WE'RE ENCLOSING A STATEMENT CONCERNING THE

17 ORIGIN AND PURPOSE OF THIS COMMITTEE AND ITS

18 PROPOSED FUNCTIONS. WE WOULD APPRECIATE" -- IT

19 WAS SENT TO THE JUSTICE DEPARTMENT. THEY THANKED THE
20 ORGANIZATION FOR IT. THEY SAID, YOU KNOW, "SEND US ANYTHING

21 ELSE YOU WANT TO SEND US."

22 DR. POLLAY TESTIFIED THAT THIS ORGANIZATION PUT
23 TOGETHER SOMETHING CALLED "THE SCIENTIFIC PERSPECTIVE ON THE
24 CIGARETTE CONTROVERSY." THIS WAS PLAINTIFF'S EXHIBIT 29.
25 REMEMBER, THIS WAS THE PAPER THAT TOOK ALL THE MEDICAL
26 LITERATURE ON THE SUBJECT AND PULLED TOGETHER SOME THINGS
27 THAT PEOPLE HAD SAID THAT RELATED TO THE CURRENT THEORIES
28 ABOUT SMOKING OR ABOUT CANCER.

0079

1 DR. POLLAY SAID THERE IS NOTHING IN HERE THAT IS
2 INCORRECT. IT'S NOT A MISSTATEMENT OF FACT. THERE'S
3 NOTHING HERE THAT WAS FALSE. DR. POLLAY ALSO SAID THAT THIS
4 ORGANIZATION PUT OUT PRESS RELEASES, BUT THEY DID NOT
5 CONTAIN MISSTATEMENTS OF FACT.

6 AND SO WHAT THIS ORGANIZATION DID WAS WITHIN
7 MONTHS OF THE SKIN-PAINTING EXPERIMENTS BEING PUBLISHED,
8 THEY FORMED AN ORGANIZATION, AND YES, THEY HIRED A PUBLIC
9 RELATIONS FIRM TO HELP THEM PUT THE ORGANIZATION TOGETHER, A
10 PUBLIC RELATIONS FIRM THAT WAS WELL-KNOWN, ACCORDING TO DR.
11 POLLAY, AT THE TIME. AND NO BIG SECRET. AND THEY PUT AN
12 ORGANIZATION TOGETHER TO SPONSOR RESEARCH.

13 THAT'S NOT EVIDENCE OF A CONSPIRACY. IT'S NOT
14 EVIDENCE OF UNREASONABLE CONDUCT. IT'S EVIDENCE OF
15 REASONABLE CONDUCT. IF PHILIP MORRIS OR OTHER COMPANIES
16 HADN'T DONE THIS IN 1954, A LAWYER WOULD STAND HERE AND SAY
17 TO YOU THEY SHOULD HAVE DONE SOMETHING. THEY SHOULD HAVE
18 GOTTEN TOGETHER AND SPONSORED RESEARCH. THEY SHOULD MADE
19 SURE THIS ISSUE WAS GETTING LOOKED AT. THAT IS EXACTLY WHAT
20 THEY DID.

21 AND YOU HEARD DR. POLLAY, YOU HEARD DR. DAVIS,
22 AND YOU HEARD DR. ELLIS TELL YOU THAT BETWEEN 1954 AND 1998,
23 THIS ORGANIZATION, WHICH BECAME THE COUNCIL FOR TOBACCO
24 RESEARCH, PROVIDED HUNDREDS OF MILLIONS OF DOLLARS TO
25 RESEARCHERS TO DO RESEARCH IN THE AREA OF CANCER. THE
26 RESEARCHERS WERE SPONSORED BY OTHERS, INCLUDING THE NATIONAL
27 INSTITUTE OF HEALTH. REMEMBER, DR. ELLIS EXPLAINED THAT ONE
28 ORGANIZATION WILL GIVE RESEARCHERS MONEY AND ANOTHER

0080

1 ORGANIZATION WILL GIVE THE RESEARCHERS MONEY SO THEY CAN PUT
2 THEIR EFFORTS TOGETHER.

3 THEY PUBLISHED ANNUAL REPORTS AND LISTED WHAT IT
4 WAS THEY HAD, THE RESEARCH THEY HAD CONDUCTED, RESEARCH DONE
5 AT ACADEMIC INSTITUTIONS AND MEDICAL SCHOOLS. IT WAS DONE
6 BY PEOPLE WHO WENT ON TO WIN NOBEL PRIZES FOR OTHER THINGS,
7 BUT CERTAINLY THEY WERE RESPECTED RESEARCHERS. THE RESEARCH
8 WAS PUBLISHED, AND THE SURGEON GENERAL CITED TO THE RESEARCH
9 IN THE SURGEON GENERAL'S REPORTS HUNDREDS OF TIMES.

10 IN FACT, AS DR. ELLIS TOLD YOU, A LOT OF THE
11 RESEARCH THIS ORGANIZATION SPONSORED AND WAS THEN PUBLISHED
12 BY THE PEOPLE WHO DID THE RESEARCH SUGGESTED THAT SMOKING
13 MAY ACTUALLY OR IN FACT CAUSED DISEASE. IT WASN'T ALL
14 RESEARCH DESIGNED TO PROVE THAT SMOKING DOESN'T CAUSE
15 DISEASE. IT WAS RESEARCH MONEY GIVEN TO RESEARCHERS TO DO
16 THE RESEARCH AND PUBLISH IT, REGARDLESS OF WHAT THE RESULTS
17 WERE. AND MANY OF THE THINGS THAT WERE PUBLISHED WERE
18 ACTUALLY MORE CONSISTENT WITH THE IDEA THAT SMOKING CAUSES
19 DISEASE THAN SMOKING DOESN'T CAUSE DISEASE.

20 IT'S NOT THE ONLY THING THAT PHILIP MORRIS OR
21 OTHER COMPANIES DID TO SPONSOR RESEARCH. LATER ON IN THE
22 '60S -- YOU'LL REMEMBER WE TALKED ABOUT THIS WITH DR.
23 FEINGOLD. IT'S DEFENDANT'S EXHIBIT 2816, THE TOBACCO AND

24 HEALTH AND THE AMA-ERF FUND. \$15 MILLION FROM '64 TO '73,
25 COFUNDED BY THE UNITED STATES PUBLIC HEALTH SERVICE, 219
26 RESEARCH PROJECTS BY 844 RESEARCHERS.

27 THE PEOPLE WHO GOT THE RESEARCH MONEY WERE
28 REQUIRED TO PUBLISH THE RESULTS OF THEIR RESEARCH. THEY

0081
1 PUBLISHED ALMOST 800 PAPERS ON SMOKING AND HEALTH AND IT WAS
2 ALL PUT TOGETHER IN THIS BOOK THAT WAS PUBLISHED IN 1978.

3 AND YOU WILL RECALL DR. FEINGOLD DESCRIBED ALL
4 THIS AS A BOONDOGGLE. THOSE WERE HIS WORDS. HE LAUGHED AND
5 SAID THAT WAS A BOONDOGGLE. WELL, THAT MAY WELL BE DR.
6 FEINGOLD'S OPINION, BUT THE GROUP OF PEOPLE WHO WERE ON THE
7 COMMITTEE THAT PUT IT TOGETHER INCLUDED THREE OF THE PEOPLE
8 WHO WERE ON THE 1964 COMMITTEE THAT WROTE THE FIRST SURGEON
9 GENERAL'S REPORT.

10 THE COMMITTEE ITSELF WROTE IN THIS BOOK THAT THEY
11 WERE PROUD AND SATISFIED WITH THE WORK THAT HAD BEEN
12 COMPLETED AND THE SPONSORSHIP OF THE AMA PROJECT FOR
13 RESEARCH AND TOBACCO AND HEALTH. THEY EXPRESSED
14 APPRECIATION TO THE AMERICAN MEDICAL ASSOCIATION AND THE
15 TOBACCO INDUSTRY, INCLUDING PHILIP MORRIS, FOR SPONSORING
16 THE EFFORT AND THEY APPRECIATED THE WORK THAT THE GRANTEES
17 AND INSTITUTIONS DID IN FINDING SOLUTIONS TO GAPS IN
18 KNOWLEDGE IN THIS COMPLICATED AREA OF SCIENTIFIC INQUIRY.

19 REMEMBER, THERE WAS A PIECE OF EVIDENCE THE
20 PLAINTIFF PUT IN EARLY IN THE CASE WHERE JOE CULLMAN, WHO IS
21 ONE OF THE EXECUTIVES AT PHILIP MORRIS, MADE A SPEECH
22 SOMEWHERE AND SAID SOMETHING ABOUT GAPS IN KNOWLEDGE RELATED
23 TO SMOKING AND HEALTH. THE DATA ON THAT EXHIBIT IS BEFORE
24 THIS (INDICATING). SO EVEN BY 1977, THE AMERICAN MEDICAL
25 ASSOCIATION, ITS COMMITTEE ON RESEARCH, DESCRIBED THERE
26 BEING GAPS IN KNOWLEDGE IN A COMPLICATED AREA OF SCIENTIFIC
27 INQUIRY.

28 AND REMEMBER DR. FEINGOLD'S FINAL COMMENT WAS

0082
1 "GEE, THEY DIDN'T DO ENOUGH RESEARCH ON CANCER
2 CARCINOGENESIS." BUT AGAIN, REMEMBER THE COMMITTEE POINTS
3 OUT VERY SPECIFICALLY THAT ONE OF THE REASONS THEY DIDN'T DO
4 THAT WAS BECAUSE THE NATIONAL INSTITUTE OF HEALTH WAS
5 ALREADY GENEROUSLY FUNDING RESEARCH IN THAT AREA. AND THEY
6 WANTED TO PUT THE EFFORT INTO SOME OTHER AREAS, INCLUDING
7 THINGS THAT RELATED TO NICOTINE AND OTHER ASPECTS OF
8 CIGARETTES AND CIGARETTE SMOKING.

9 SO THAT'S ANOTHER EXAMPLE OF RESEARCH SPONSORED
10 BY PHILIP MORRIS WHERE THE RESEARCHERS HAD THE ABILITY TO
11 PUBLISH THE RESULTS OF THEIR RESEARCH. IT'S EVIDENCE OF
12 REASONABLE CONDUCT. IT'S WHAT YOU WOULD EXPECT A
13 MANUFACTURER WHO IS MAKING A PRODUCT THAT HAS RISK
14 ASSOCIATED WITH IT, THAT IS CONTROVERSIAL, TO DO. GIVE
15 PEOPLE MONEY, LET THEM DO RESEARCH, AND LET THEM TELL
16 ANYBODY IN THE WORLD WHAT THE RESULTS OF THAT RESEARCH ARE.

17 THE OTHER THING PHILIP MORRIS AND OTHER TOBACCO
18 COMPANIES DID -- YOU HEARD ABOUT THIS. DR. BENOWITZ EVEN
19 TALKED ABOUT THIS, AS DID DR. ELLIS (INDICATING) -- THEY
20 PROVIDED THE FUNDING FOR THREE DOCTORS, DR. LARSON, DR. HAAG
21 AND DR. SILVETTE TO COLLECT EVERY PIECE OF MEDICAL AND
22 SCIENTIFIC LITERATURE THAT RELATED TO TOBACCO AND SMOKING
23 AND NICOTINE AND COLLECT THEM IN THESE BOOKS (INDICATING),
24 AND THEN UPDATE IT THREE DIFFERENT TIMES, BEGINNING IN THE
25 '60S, ENDING UP IN THE LATE OR MIDDLE 1970S.

26 DR. BENOWITZ AND DR. DAVIS TALKED ABOUT A

27 DATABASE OF LITERATURE ON SMOKING AND HEALTH. THIS IS THE
28 1960S EQUIVALENT OF A DATABASE (INDICATING) COLLECTED ALL IN

0083

1 ONE PLACE WHERE PEOPLE CAN USE IT AND LOOK AT IT AND USE IT
2 TO MAKE DECISIONS ABOUT RESEARCH. AND THIS WAS SOMETHING
3 AGAIN THAT WAS SPONSORED BY PHILIP MORRIS AND OTHER TOBACCO
4 COMPANIES.

5 YOU ALSO HEARD DR. ELLIS TELL YOU THAT THE
6 COMPANY PATENTED THINGS, PUBLISHED THE RESULTS OF THEIR
7 RESEARCH, HUNDREDS OF RESEARCH PAPERS OF RESEARCH DONE IN
8 PHILIP MORRIS LABORATORIES.

9 SHE TOLD YOU ON DIRECT AND SHE TOLD MS. CHABER
10 AGAIN ON CROSS-EXAMINATION THAT PHILIP MORRIS DID RESEARCH
11 AT LABORATORIES IN THE UNITED STATES THAT THEY WOULD
12 CONTRACT OUT TO DO, LABORATORIES WHO HAD SPECIALTIES OR
13 FACILITIES OR EXPERIENCE IN CERTAIN THINGS, THAT PHILIP
14 MORRIS DID SOME TYPES OF RESEARCH IN-HOUSE, SOME BIOLOGICAL
15 RESEARCH INVOLVING ASSAYS AND OTHER CELL THINGS, THEY DID
16 ANIMAL INHALATION RESEARCH AT A FACILITY THEY OWNED IN
17 GERMANY CALLED INBIFO, AND THEY WORKED WITH OTHERS TO HAVE
18 MEETINGS WHERE PEOPLE COULD COME AND SHARE IDEAS ABOUT
19 SMOKING AND HEALTH, ALL OF IT INVOLVING PEOPLE UNCONNECTED
20 TO THE TOBACCO INDUSTRY, INCLUDING PEOPLE FROM THE
21 GOVERNMENT.

22 SO THE POINT -- I HAVE KIND OF GOTTEN OFF THE
23 TRACK HERE. BUT IN 1954, PHILIP MORRIS AND OTHER CIGARETTE
24 COMPANIES STARTED SPONSORING RESEARCH THAT CONTINUED THROUGH
25 THE '60S WITH THE WORK DONE BY THE AMERICAN MEDICAL
26 ASSOCIATION. THEY SPONSORED THESE DOCTORS AND THEIR EFFORTS
27 TO COLLECT ALL OF THE SCIENTIFIC LITERATURE ON TOBACCO AND
28 PUBLISH IT FOR OTHER PEOPLE TO USE. AND THEY DID RESEARCH

0084

1 IN THEIR OWN LABORATORIES TO TRY TO ANSWER SOME OF THESE
2 QUESTIONS.

3 I'M GOING TO TALK IN A MINUTE ABOUT WHAT THEY
4 ACTUALLY DID AND HOW IT RESULTED. BUT I WANT TO JUST SAY
5 THIS. REMEMBER, PLAINTIFF'S EXHIBIT 21 WAS THE ARTICLES
6 THAT DR. FEINGOLD TALKED ABOUT IN TERMS OF WHAT PEOPLE WERE
7 WRITING ABOUT WITH RESPECT TO SMOKING AND HEALTH AT VARIOUS
8 POINTS IN TIME. AND, YOU KNOW, HE QUOTED SOME THINGS FROM
9 THOSE ARTICLES THAT MADE IT SOUND LIKE IN 1950 OR IN 1952,
10 CASE CLOSED. EVERYBODY HAD MADE A DECISION ABOUT WHETHER
11 SMOKING WAS ACTUALLY A CAUSE OF LUNG CANCER.

12 AND IF YOU LOOK CAREFULLY AT SOME OF THE OTHER
13 EVIDENCE, IT'S OBVIOUS THAT THAT'S NOT QUITE CORRECT. FIRST
14 OF ALL, DR. DAVIS TESTIFIED THAT IT REALLY WASN'T UNTIL 1964
15 THAT ANYBODY FORMED ANY REASONABLY CERTAIN JUDGMENTS ABOUT
16 ANY OF THIS, AND THAT WAS THE SURGEON GENERAL'S REPORT.

17 BUT IF YOU LOOK AT DEFENDANT'S 2574, THIS IS DR.
18 CUYLER HAMMOND, WHO WAS THE PRESIDENT OF THE -- DIRECTOR OF
19 STATISTICAL RESEARCH AT THE AMERICAN CANCER SOCIETY. AND
20 THEY ASKED HIM: "DOES SMOKING REALLY CAUSE LUNG CANCER?"
21 AND HE SAYS:

22 "THAT'S JUST WHAT WE ARE TRYING TO FIND OUT.
23 THERE IS SOME EVIDENCE THAT IT MAY BE SO."

24 HE POINTS TO THE SKIN-PAINTING EXPERIMENTS. HE
25 SAYS:

26 "IT'S IMPORTANT, BUT ALONE IT DOESN'T PROVE A
27 THING ABOUT THE OCCURRENCE OF LUNG CANCER IN
28 HUMAN BEINGS. YOU HAVE GOT TO WEIGH IT. WE'RE

0085

1 STILL COLLECTING INFORMATION. AND YOU CAN'T
2 JUMP TO THE CONCLUSION THAT BECAUSE SOMETHING
3 PRODUCES CANCER ON THE SKIN OF AN ANIMAL, IT WILL
4 PRODUCE IT IN A MAN, BECAUSE THE MOUSE SKIN IS A
5 LITTLE DIFFERENT THAN THE ISSUE AT HAND."
6 THIS IS 1954 (WRITING ON BOARD) WHEN

7 DISTINGUISHED AUTHORITIES POINT OUT THAT MEDICAL RESEARCH
8 INDICATES MANY POSSIBLE CAUSES OF LUNG CANCER, AND THERE IS
9 NO AGREEMENT REGARDING WHAT THE CAUSE IS AND THAT THE PROOF
10 ISN'T IN YET ON CIGARETTES AND THE STATISTICS COULD APPLY TO
11 OTHER THINGS.

12 WELL, HERE IS A DISTINGUISHED AUTHORITY. HE'S
13 NOT EMPLOYED BY PHILIP MORRIS. HE'S PART OF THE AMERICAN
14 CANCER SOCIETY. AND IN 1954, HE SAYS: "WE'RE STILL
15 COLLECTING INFORMATION."

16 DR. WYNDER -- THIS IS DEFENDANT'S EXHIBIT 2796.
17 DR. WYNDER IS THE SAME DR. WYNDER WHO DID THIS STUDY IN
18 1950. HE'S THE SAME DR. WYNDER WHO DID THE SKIN-PAINTING
19 STUDY IN 1953. HE WRITES AN ARTICLE IN THE CONNECTICUT
20 MEDICAL JOURNAL IN 1954. SO WE'VE GOT TWO OF THEM HERE IN
21 '54.

22 THIS IS DR. WYNDER. AND WHAT HE SAYS IS:
23 "YOU KNOW, THE PROBLEM WITH THESE STATISTICS AND
24 THESE STATISTICAL STUDIES IS SOMETIMES THEY ARE
25 POORLY PREPARED, ASSEMBLED AND ANALYZED, SO WE
26 HAVE DOUBTED THE VALUE OF PURELY STATISTICAL
27 ASSOCIATIONS. THEY CAN HAVE ERRORS THAT WILL
28 LEAD TO ERRONEOUS CONCLUSIONS."

0086

1 "WHEN PEOPLE STARTED USING EPIDEMIOLOGY, THERE
2 WERE TWO QUESTIONS THEY WERE ASKING." AND THIS IS
3 ALL PART OF THE EVIDENCE IN PLAINTIFF'S EXHIBIT
4 21. "IS THERE MORE LUNG CANCER BECAUSE WE'RE
5 JUST GETTING BETTER AT DIAGNOSING IT OR PEOPLE
6 ARE JUST LIVING LONG ENOUGH TO GET IT OR IS IT
7 REALLY INCREASING?"

8 SO THAT WAS ONE QUESTION THAT THEY HAD TO
9 ANSWER. THE NEXT QUESTION THEY HAD TO ANSWER WAS:
10 "ARE THESE STATISTICAL STUDIES LEADING US TO THE
11 RIGHT CONCLUSION OR SHOULD WE BE CAUTIOUS OR
12 SKEPTICAL ABOUT WHAT REALLY THEY MEAN?"
13 AND THAT'S WHAT DR. WYNDER IS SAYING RIGHT HERE.

14 HE ALSO SAID IN THE SAME ARTICLE THAT:
15 "THE MOUSE SKIN DATA DON'T INFLUENCE THE PROOF
16 AT HAND. THE MOUSE SKIN IS NOT LIKE THE
17 BRONCHIAL EPITHELIUM. IT IS NOT DEFINITIVE PROOF
18 FOR A HUMAN CARCINOGEN."

19 THAT'S DR. WYNDER AT THE SAME TIME, ANOTHER
20 DISTINGUISHED AUTHORITY.

21 IF YOU GO BACK AND LOOK AT PLAINTIFF'S EXHIBIT
22 21. FOR EXAMPLE, EXHIBIT 21-16 WAS WRITTEN IN 1950 BY DRS.
23 DOLL AND HILL, THESE GUYS (INDICATING). THEY POINT OUT
24 THAT:

25 "MANY WRITERS HAVE CONSIDERED WHETHER THERE
26 REALLY IS AN INCREASE IN LUNG CANCER OR WHETHER
27 WE'RE JUST GETTING BETTER AT DIAGNOSING IT."
28 IF YOU LOOK AT 21-5, THE SAME DRS. DOLL AND HILL

0087

1 SAY THAT THEY THINK THERE IS A REAL ASSOCIATION.
2 "STATISTICS ARE VALID ASSOCIATING SMOKING AND

3 CANCER. BUT IT'S NOT THE SOLE CAUSE OF THE
4 INCREASED DEATH RATE OF RECENT YEARS, NOR CAN IT
5 WHOLLY EXPLAIN THE DIFFERENT MORTALITY RATES
6 BETWEEN PEOPLE WHO LIVE IN THE CITY AND PEOPLE
7 WHO LIVE IN THE COUNTY."

8 PLAINTIFF'S EXHIBIT 21-10 IS ANOTHER ARTICLE BY
9 DOLL AND HILL WHERE THEY TALK ABOUT THE ASSOCIATION, THE
10 STATISTICAL RELATIONSHIP BETWEEN SMOKING AND CANCER. AND
11 THEY SAY:

12 "AUTHORS HAVE SHOWN THAT THERE IS AN ASSOCIATION
13 BUT THEY'VE DIFFERED IN THEIR INTERPRETATION.
14 SOME HAVE CONSIDERED THAT THE ONLY REASONABLE
15 EXPLANATION IS THAT SMOKING IS A FACTOR IN
16 PRODUCING DISEASE. OTHERS HAVE NOT BEEN PREPARED
17 TO DEDUCE CAUSATION AND HAVE LEFT THE ASSOCIATION
18 UNEXPLAINED."

19 SO EVEN IN 1954, DOLL AND HILL ARE POINTING OUT
20 THAT REASONABLE PEOPLE, DISTINGUISHED AUTHORITIES HAVEN'T
21 JUMPED TO THE CONCLUSION OR FORMED A JUDGMENT YET THAT JUST
22 BECAUSE THESE STATISTICS ASSOCIATE SMOKING AND CANCER, THAT
23 IT MUST BE A CAUSE OF CANCER.

24 21-14 IS AGAIN -- PLAINTIFF'S EXHIBIT 21-14, THE
25 SURGEON GENERAL OF THE UNITED STATES IN 1959 POINTS OUT
26 THAT:

27 "MANY PEOPLE ARE INVESTIGATING THE RELATIONSHIP
28 BETWEEN SMOKING AND HEALTH."

0088

1 AND HE POINTS OUT SOME OF THE EVIDENCE THAT
2 CONTRADICTS THE IDEA THAT SMOKING CAUSES CANCER. AND HE
3 POINTS OUT THE FACT THAT BERKSON, WHO WAS AT THE MAYO
4 CLINIC, "DOESN'T AGREE WITH THE STATISTICS." HE POINTS OUT
5 THAT:

6 "THERE IS A THEORY OR A HYPOTHESIS THAT DEALS
7 WITH PEOPLE'S PERSONALITIES. THE SAME THING THAT
8 CAUSES PEOPLE TO SMOKE MAY PREDISPOSE THEM TO
9 LUNG CANCER."

10 HE SAYS THAT:

11 "ANIMAL EXPERIMENTS ON INHALATION OF CIGARETTE
12 SMOKE HAVE FAILED TO PRODUCE A SINGLE CANCER
13 SIMILAR TO THE MOST PREVALENT TYPE OF LUNG CANCER
14 IN HUMANS."

15 HE TALKS ABOUT GENETIC FACTORS, TALKS ABOUT THE
16 FACT THAT AIR POLLUTION IS SUSPECTED OF BEING A CAUSE OF
17 CANCER, AND THE FACT THAT CANCER OCCURS IN NONSMOKERS AND
18 THE ABSENCE OF EXPERIMENTAL DATA.

19 ALL OF THAT -- REMEMBER DR. SMITH, WHO SAID THAT
20 THERE WAS SOME QUAIN HYPOTHESIS -- HE EVEN GIGGLED -- HE
21 SAID THERE WAS SOME QUAIN HYPOTHESIS ABOUT OTHER THINGS
22 THAT MIGHT CAUSE CANCER BESIDES SMOKING, BUT NO ONE REALLY
23 BELIEVES THEY WERE. JUST CIGARETTE COMPANIES SAID THAT.

24 THESE ARE THE QUAIN HYPOTHESES HE'S LAUGHING
25 ABOUT (INDICATING). THERE IS NOTHING TO LAUGH ABOUT HERE.
26 THESE ARE VARIOUS RESEARCHERS SAYING SERIOUS THINGS AT A
27 TIME WHEN PEOPLE ARE DEVELOPING THE KNOWLEDGE THAT THEY USED
28 TO FORM A JUDGMENT ABOUT THIS RELATIONSHIP.

0089

1 IN FACT, THE 1964 SURGEON GENERAL'S REPORT, WHICH
2 IS IN EVIDENCE AS DEFENDANT'S 2828-A, HAS A WHOLE SECTION ON
3 "OTHER ETIOLOGICAL CONSIDERATIONS." THAT MEANS OTHER
4 THINGS THAT MIGHT CAUSE LUNG CANCER BESIDES SMOKING. AND
5 THEY POINT OUT IN THE FIRST SENTENCE:

6 "THERE ARE A VARIETY OF HYPOTHESES OR OPINIONS
7 ABOUT OTHER CAUSES BESIDES SMOKING THAT DESERVE
8 MERIT."
9

10 THEY POINT OUT THAT:
11

12 "THESE ARE REASONABLE RESEARCHERS WITH
13 REASONABLE IDEAS ABOUT THE QUESTION."
14 SO IT'S FAR TOO SIMPLE TO SAY THAT IN 1950, DR.
15 WYNDER AND DR. HAMMOND PUBLISHED A STUDY THAT ANSWERED THE
16 QUESTION.

17 THERE WERE DISTINGUISHED AUTHORITIES AFTER 1954,
18 UP INTO 1959, WHO WERE SAYING THE SAME KINDS OF THINGS THAT
19 WERE SAID IN THAT "FRANK STATEMENT TO CIGARETTE SMOKERS."
20 AND AGAIN, THIS IS ALL EVIDENCE YOU HAVE GOT TO USE TO PUT
21 THINGS INTO CONTEXT AND TO JUDGE THE REASONABLENESS OF
22 PHILIP MORRIS' CONDUCT AND TO ANSWER SOME OF THE QUESTIONS
23 THAT ARE GOING TO BE PUT TO YOU IN THE CASE.

24 IN FACT, THE ISSUE OF STATISTICS IS SOMETHING
25 THAT THE SURGEON GENERAL HAS DEALT WITH REPEATEDLY. IN
26 1964, IN 1975 AND IN 1985 -- AND THOSE ARE ALL DEFENSE
27 EXHIBITS 2828-A, B AND G -- THE SURGEON GENERAL POINTS OUT
28 THAT "STATISTICS CAN'T PROVE THAT SOMETHING CAUSES SOMETHING
ELSE." AND THEY POINT OUT SPECIFICALLY THAT:

"YOU CAN'T USE THESE STATISTICAL ASSOCIATIONS TO

0090
1 DETERMINE WHAT CAUSED CANCER IN AN INDIVIDUAL,
2 THAT DETERMINING CAUSE GOES BEYOND A MERE
3 STATISTICAL PROBABILITY, SPECIFICALLY FOR AN
4 INDIVIDUAL, ESPECIALLY IF THE DISEASE HAS
5 MULTIPLE CAUSES AND THEIR ACTIONS AND
6 INTERACTIONS ARE POTENTIALLY IMPORTANT."
7 THIS IS 1985 EVEN. THE SURGEON GENERAL IS STILL
8 TALKING ABOUT STATISTICS NOT BEING SUFFICIENT TO PROVE THE
9 CAUSE OF DISEASE IN AN INDIVIDUAL.

10 IN 1982 -- THIS IS DEFENDANT'S 2828-F -- THE
11 SURGEON GENERAL POINTS OUT, AS THEY DID IN 1959, THAT:
12 "INHALATION EXPERIMENTS HAVE BEEN NEGATIVE.
13 THEY HAVE ATTEMPTED TO INDUCE TUMORS IN
14 LABORATORY ANIMALS. THEY'VE MADE MAJOR EFFORTS
15 TO DO SO AND THEY'VE BEEN NEGATIVE."
16 THIS IS EXHIBIT 2828-F, WHERE THE SURGEON GENERAL
17 POINTS OUT IN 1982 THAT:

18 "THE ISSUE OF TOBACCO AND CARCINOGENESIS HAS
19 BEEN STUDIED EXTENSIVELY. THERE'S EXPANDED
20 KNOWLEDGE OVER THE YEARS. THERE ARE GAPS IN
21 KNOWLEDGE."

22 THAT BECAME THE WORD, "GAPS IN KNOWLEDGE." DR.
23 FEINGOLD MADE IT SOUND LIKE MR. CULLMAN HAD KIND OF MADE
24 THAT WORD UP AND TRIED TO USE IT TO SUGGEST SOMETHING THAT
25 DIDN'T EXIST. THERE ARE GAPS IN KNOWLEDGE. THE SURGEON
26 GENERAL OF THE UNITED STATES, THE AMERICAN MEDICAL
27 ASSOCIATION AND OTHER PEOPLE HAVE TALKED ABOUT IT.

28 "AGAIN, ATTEMPTS TO INDUCE" -- THIS IS THE SAME

0091
1 QUOTE FROM BEFORE, THE GAPS IN THE KNOWLEDGE.
2 "AND THE REASON PERHAPS THESE GAPS EXIST" --
3 AND DR. HAMMOND TALKED ABOUT SOME OF THIS -- "IS
4 THERE IS A LOT ABOUT CANCER, INCLUDING LUNG
5 CANCER, THAT PEOPLE DON'T UNDERSTAND."
6 YOU HEARD SOME DISCUSSION ABOUT MECHANISM AND
7 WHAT IT IS THAT CHANGES A CELL FROM NORMAL TO ABNORMAL. AND
8 EVEN AS LATE AS 1985, THE SURGEON GENERAL WAS SAYING THAT

9 THOSE ARE THE KINDS OF THINGS THAT AREN'T YET KNOWN.
10 I WANT TO SAY ONE OTHER THING BEFORE I TAKE A
11 SHORT BREAK HERE. REMEMBER, PLAINTIFF'S EXHIBIT 7-32 WAS
12 THE REPORT THAT DR. WAKEHAM AT PHILIP MORRIS PREPARED TO THE
13 RESEARCH COMMITTEE IN 1961. AND DR. ELLIS AND I TALKED
14 ABOUT IT ON HER DIRECT EXAMINATION. IT WAS WRITTEN IN ABOUT
15 1961.

16 AND IN THAT REPORT, DR. WAKEHAM -- THIS IS 1961
17 (WRITING ON BOARD) -- DR. WAKEHAM DESCRIBED THE EVIDENCE
18 LINKING CANCER AND TOBACCO. HE SAID:

19 "IT'S BASED ON TWO MAIN POINTS. STATISTICAL
20 EVIDENCE THAT CERTAIN DISEASES ARE MORE PREVALENT
21 AMONG SMOKERS THAN NONSMOKERS. THOSE
22 ASSOCIATIONS SUGGEST THAT SMOKING MAY BE A
23 CAUSATIVE FACTOR. PHYSIOLOGICAL TESTS IN WHICH
24 ANIMALS ARE TREATED WITH SMOKE CONDENSATES" --
25 THAT'S THE SKIN PAINTING -- "SMOKE INHALATION
26 EXPERIMENTS HAVE FAILED TO PRODUCE LUNG CANCER."

27 WHAT DR. WAKEHAM TOLD THE RESEARCH DEPARTMENT AT
28 PHILIP MORRIS IN 1961 IS ALMOST EXACTLY WHAT DR. HAMMOND

0092

1 SAID IN 1954, WHAT DR. WYNDER SAID IN 1954.

2 WHAT THE SURGEON GENERAL SAID IN 1959 IN
3 PLAINTIFF'S EXHIBIT 21-14 IS -- WHAT THE SURGEON GENERAL HAS
4 SAID IS STILL THE EVIDENCE EVEN TODAY.

5 THIS STATEMENT WAS A FAIR STATEMENT AT THE TIME
6 IT WAS MADE (INDICATING). IT'S A FAIR STATEMENT TODAY.
7 IT'S NOT EVIDENCE THAT PHILIP MORRIS KNEW ANYTHING MORE THAN
8 WAS BEING SAID BY ANY OF THESE PEOPLE ON THIS SUBJECT. IT'S
9 EVIDENCE THAT PHILIP MORRIS WAS LOOKING AT THE QUESTION.
10 AND WHEN I SHOW YOU THE REST OF THIS DOCUMENT AFTER THE
11 BREAK, I WILL SHOW YOU HOW THEY USED THIS INFORMATION TO TRY
12 TO DEVELOP PRODUCTS THAT REDUCED THE RISKS ASSOCIATED WITH
13 CIGARETTE SMOKE.

14 THIS IS A GOOD SPOT FOR A BREAK.

15 THE COURT: OKAY. JURORS, LET'S TAKE A
16 15-MINUTE BREAK TILL A QUARTER TO 3:00. PLEASE CONTINUE TO
17 FOLLOW THE ADMONITION. WE'LL SEE YOU BACK AT A QUARTER TO
18 3:00.

19 (RECESS TAKEN FROM 2:28 TO 2:45 P.M.)

20 THE COURT: WE'RE BACK ON THE RECORD. MR.
21 OHLEMAYER, YOU MAY CONTINUE.

22 MR. OHLEMAYER: THANK YOU, YOUR HONOR.

23 I WANT TO DRAW ALMOST A BRIGHT LINE RIGHT HERE ON
24 TWO TOPICS (WRITING ON BOARD), JUDGMENT AND CONDUCT.

25 BECAUSE ONE OF THE THINGS I WANT TO ADD TO THIS
26 IS IF YOU LOOK AT DEFENDANT'S EXHIBITS 2795 AND 2824, 2795
27 WAS A 1948 ARTICLE BY DR. OCHSNER, WHERE AS YOU RECALL HE
28 SAID THAT, YOU KNOW, DESPITE WHAT THEY HAD SAID IN 1941,

0093

1 THAT THEY REALLY WEREN'T SO SURE THAT ANY FACTOR HAS SPECIAL
2 SIGNIFICANCE FROM THE STANDPOINT OF WHAT MIGHT CAUSE LUNG
3 CANCER IN THEIR CASES. SO EVEN THE SAME DOCTORS OVER TIME
4 KIND OF CHANGE THEIR MIND ABOUT THINGS.

5 BUT 2824 IS AN ARTICLE BY A DOCTOR FROM THE MAYO
6 CLINIC IN 1959, WHERE HE POINTS OUT THAT EVEN THOUGH A
7 NUMBER OF WRITERS HAVE EXPRESSED THE OPINION THAT SMOKING IS
8 A CAUSE OF CANCER, THAT THE EVIDENCE -- THE STATISTICS
9 REALLY DON'T, IN HIS OPINION, CONFIRM THAT CONCLUSION.

10 SO YOU STILL HAVE PEOPLE BY 1959, DISTINGUISHED
11 AUTHORITIES, NOT PEOPLE WHO YOU WOULD DESCRIBE AS

12 UNREASONABLE OR ILL-INFORMED, EXPRESSING DOUBTS ABOUT THE
13 SIGNIFICANCE OF THIS EVIDENCE.

14 AND THAT'S MY POINT. THERE CAME A POINT IN TIME
15 WHERE, IN 1964, THE SURGEON GENERAL OF THE UNITED STATES
16 MADE A JUDGMENT ABOUT THIS EVIDENCE. AND THE EVIDENCE
17 DIDN'T CHANGE. IT WAS STILL STATISTICS. IT WAS STILL MOUSE
18 SKIN. THERE WAS STILL THE ABSENCE OF INHALATION EXPERIMENTS
19 (INDICATING). BUT FOR THE REASONS DESCRIBED IN THE SURGEON
20 GENERAL'S REPORTS, THEY CONCLUDED -- THE COMMITTEE CONCLUDED
21 THAT YOU SHOULD DESCRIBE CIGARETTE SMOKING AS A CAUSE OF
22 LUNG CANCER AND THAT THE PUBLIC HEALTH SERVICE SHOULD DO
23 SOMETHING ALONG THOSE REGARDS TO PUBLICIZE AND MAKE THAT
24 INFORMATION AVAILABLE.

25 THE EVIDENCE REALLY HASN'T CHANGED EVEN UP TO
26 TODAY. BECAUSE IF YOU LOOK AT THE SURGEON GENERAL'S REPORTS
27 THAT WE LOOKED AT EARLIER, THEY STILL TALK ABOUT STATISTICS
28 NOT BEING ENOUGH TO PROVE CAUSE. THEY STILL TALK ABOUT THE

0094

1 MOUSE-SKIN PAINTING BEING INCONCLUSIVE. THEY STILL TALK
2 ABOUT THE INHALATION EXPERIMENTS BEING NEGATIVE AGAIN, WHICH
3 IS ALL THE SAME KINDS OF THINGS THAT DR. WAKEHAM WAS SAYING
4 IN 1961 (INDICATING).

5 SO THE EVIDENCE REALLY HASN'T CHANGED. BUT
6 PEOPLE'S JUDGMENTS ABOUT THAT EVIDENCE AND THE CONTEXT IN
7 WHICH THEY'VE MADE THOSE JUDGMENTS HAVE CHANGED. NOTHING
8 THAT DR. WAKEHAM SAID IN THIS DOCUMENT WAS ANYTHING UNIQUE
9 OR INFORMATION THAT WAS UNIQUE OR SECRET TO PHILIP MORRIS.
10 IT WAS THE SAME TYPE OF INFORMATION THAT THESE PEOPLE HAD
11 (INDICATING).

12 AND WITH RESPECT TO THE JUDGMENT ABOUT THIS
13 EVIDENCE, YOU DIDN'T HEAR ANYBODY FROM PHILIP MORRIS EITHER
14 IN WRITING OR IN TESTIMONY SAY "SMOKING DOES NOT CAUSE LUNG
15 CANCER." THAT'S NOT WHAT THEY SAID. THEY SAID THAT:

16 "THERE IS EVIDENCE TO SUGGEST THAT IT MIGHT,
17 THAT THESE STATISTICS ARE VERY COMPELLING AND
18 RELIED UPON NOWADAYS BY PEOPLE LIKE THE SURGEON
19 GENERAL'S COMMITTEE AND OTHERS, AS EVIDENCE OF
20 PROOF, BUT THAT NOBODY HAS STILL PROVED IN A
21 SCIENTIFIC FASHION WHY OR HOW SMOKING ACTUALLY
22 CAUSES CANCER."

23 AND THERE'S A DIFFERENCE THERE. IT'S NOT JUST
24 WORD GAMES. IT'S NOT BEING A MEMBER OF THE FLAT EARTH
25 SOCIETY OR BEING A MEMBER OF THE ROUND EARTH SOCIETY. I
26 DON'T THINK ANYONE COULD FAIRLY DESCRIBE DR. HENSLEY OR DR.
27 WARREN AS BEING MEMBERS OF THE FLAT EARTH SOCIETY. THEY'RE
28 EXPERIENCED DOCTORS WHO DESCRIBED THEIR OPINIONS BASED ON

0095

1 SCIENCE AND ALSO ON PUBLIC HEALTH. THEY SAID THAT THEY
2 UNDERSTAND WHY PEOPLE USE THOSE STATISTICS TO MAKE THOSE
3 JUDGMENTS, BUT IN A STRICTLY SCIENTIFIC SENSE, IT REALLY
4 ISN'T PROVED THE WAY OTHER THINGS GET PROVED.

5 AND SO THE WHOLE QUESTION HERE ISN'T JUST
6 NECESSARILY PHILIP MORRIS' JUDGMENT. I MEAN, IT'S NOT
7 IRRELEVANT TO THE ISSUES IN THE CASE. BUT REALLY, IT
8 DOESN'T MATTER MUCH WHETHER THEIR JUDGMENT IS RIGHT OR
9 WRONG, IT'S WHETHER IT'S REASONABLE. AND IT MIGHT BE AN
10 UNPOPULAR JUDGMENT. IT MAY BE A JUDGMENT NOT SHARED BY
11 OTHER PEOPLE. BUT THAT DOESN'T MAKE IT UNREASONABLE.

12 IT MAY BE THAT SOME DAY EVIDENCE WILL BE
13 DEVELOPED TO PROVE THAT IT'S WRONG, THAT THERE IS A WAY TO
14 PROVE THIS OR ESTABLISH IT SCIENTIFICALLY. BUT THE QUESTION

15 ISN'T WHO IS RIGHT, WHO IS WRONG? THE QUESTION IS WHAT'S
16 REASONABLE? WHAT'S UNREASONABLE? AND THE NEXT AND EQUALLY
17 IF NOT MORE IMPORTANT QUESTION IS WHAT DID THEY DO? LEAVE
18 ASIDE WHAT THEY CONCLUDED OR WHAT JUDGMENT THEY FORMED.
19 WHAT DID PHILIP MORRIS DO BASED ON THIS EVIDENCE?

20 AND THE EVIDENCE YOU HEARD IN THIS CASE IS THAT
21 THEY DIDN'T SAY: "WE JUST DISAGREE WITH IT AND IGNORE IT."
22 THEY MORE OR LESS ASSUMED IT WAS TRUE AND WENT ABOUT TRYING
23 TO DESIGN AND MANUFACTURE A PRODUCT THAT WOULD ANSWER SOME
24 OF THESE QUESTIONS AND ADDRESS SOME OF THESE CRITICISMS, TO
25 REDUCE SOME OF THE THINGS IN SMOKE PEOPLE BELIEVED MIGHT
26 ACCOUNT FOR OR CREATE THIS RELATIONSHIP, AND TO LOOK AT THAT
27 EVIDENCE.

28 YOU'VE GOT TO GO ALL THE WAY BACK TO THE '50S.

0096 1 THIS IS EXHIBIT 2637. THIS IS THE SAME DR. WYNDER THAT WE
2 HAVE TALKED ABOUT. HE'S DONE A LOT OF RESEARCH IN THE
3 AREA. HE WAS AT SLOAN-KETTERING. AND HE WAS THE ONE WHO
4 DID THE EARLY EPIDEMIOLOGY STUDIES. HE DID THE EARLY
5 MOUSE-SKIN STUDIES. HE PUBLISHED MEDICAL AND SCIENTIFIC
6 ARTICLES AS WELL AS STATEMENTS IN THE READER'S DIGEST. YOU
7 HEARD DR. POLLAY AND DR. ELLIS TELL YOU ABOUT THAT.

8 AND WHAT HE SAID WAS -- AND THESE ARE THE KINDS
9 OF THINGS THAT ARE CREATING INTEREST AND MOTIVE AND
10 OPPORTUNITY FOR PEOPLE IN THE SCIENTIFIC AND MEDICAL
11 COMMUNITY AS WELL AS AT PHILIP MORRIS.

12 YOU HEARD DR. ELLIS SAY THAT PEOPLE AT A COMPANY
13 LIKE PHILIP MORRIS READ MEDICAL AND SCIENTIFIC JOURNALS,
14 THEY LISTEN TO WHAT PEOPLE ARE SAYING ABOUT HOW YOU CAN DO
15 THINGS TO THEIR PRODUCTS. THEY GET CALLS FROM PEOPLE OUT OF
16 THE BLUE SAYING: "TRY THIS. TRY THAT." THEY CONDUCT
17 RESEARCH AND THEY TRY TO DETERMINE WHETHER THIS KIND OF
18 THING WILL WORK.

19 YOU ALSO HEARD FROM DR. POLLAY THAT STATEMENTS
20 LIKE THIS (INDICATING) CAN CREATE CONSUMER EXPECTATIONS AND
21 DEMAND, AS DID DR. ELLIS. SO THE WHOLE IDEA THAT PEOPLE
22 WERE MAKING LOW-TAR OR LOW-NICOTINE CIGARETTES ONLY BECAUSE
23 CONSUMERS WANTED THEM AND NOT BECAUSE ANYBODY WAS SAYING
24 THEY WERE RELATED TO HEALTH OR REDUCED RISK IS CONTRADICTED
25 BY THE TESTIMONY OF DR. POLLAY AND DR. ELLIS.

26 BUT THIS IS WHAT DR. POLLAY SAID AND DR. ELLIS
27 SAID WHERE IT KIND OF STARTED. THIS RESEARCHER, WHO HAD
28 BEEN INVOLVED IN THIS FIELD, SAID:

0097 1 "WHAT YOU OUGHT TO DO IS REDUCE THE AMOUNT OF
2 TAR 40 PERCENT. THAT WOULD BE A STEP IN THE
3 RIGHT DIRECTION AND A SIGNIFICANT REDUCTION IN
4 CANCER RISK." IT'S A PREDICTION THAT DR. WYNDER
5 MADE IN 1957.

6 NOW BACK TO PHILIP MORRIS. THIS AGAIN IS FROM
7 THAT SAME PLAINTIFF'S EXHIBIT, DR. WAKEHAM. IT'S
8 PLAINTIFF'S 7-32. AND WHAT DR. WAKEHAM DID -- IT'S A BIG,
9 THICK REPORT -- ALONG WITH DESCRIBING THE EVIDENCE THAT
10 LINKS CANCER AND TOBACCO, HE GAVE SOME DEFINITIONS. AND HE
11 DEFINED "CARCINOGEN" AS:

12 "A SUBSTANCE WHICH APPLIED TO THE TISSUE OF A
13 TEST ANIMAL GIVES RISE TO TUMOR FORMATION. IN
14 THESE KINDS OF TESTS, IT IS ASSUMED THAT THOSE
15 TUMORS GIVE RISE TO CANCEROUS GROWTHS AND THAT A
16 CARCINOGEN SO DEMONSTRATED IN TEST ANIMALS IS
17 DANGEROUS TO MAN." THAT'S HOW HE DEFINED

18 "CARCINOGEN."

19 NOW, MS. CHABER TOLD YOU THIS MORNING THERE WERE
20 4,000 CARCINOGENS IN SMOKE, AND I THINK SHE MISSPOKE. THE
21 EVIDENCE IN THIS CASE FROM DR. DAVIS ALL THE WAY THROUGH DR.
22 ELLIS IS THAT THERE ARE 4,000 THINGS, SUBSTANCES IN SMOKE, A
23 SMALLER NUMBER OF WHICH ARE SUSPECTED OF BEING CARCINOGENS,
24 BECAUSE IN OTHER EXPERIMENTS THEY HAVE BEEN DEMONSTRATED TO
25 PRODUCE TUMORS IN ANIMALS.

26 NOW, AS DR. ELLIS TOLD YOU, A LOT OF THOSE THINGS
27 IN SMOKE ARE IN SUCH SMALL QUANTITIES THAT THEY ALMOST
28 CANNOT MEASURE THEM AND THAT PEOPLE ENCOUNTER HIGHER DOSES

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1 OR QUANTITIES OF THOSE SUBSTANCES IN THE AIR WE BREATHE OR
2 THE WATER WE DRINK.

3 BUT THE FACT THAT THERE ARE THINGS IN SMOKE THAT
4 PEOPLE SUSPECTED AS BEING CARCINOGENS EVEN BACK IN THE '50S
5 IS NOT A SECRET. DEFENDANT'S EXHIBIT 2330 WAS A LIST
6 PUBLISHED IN 1959 IN A MAGAZINE, A CHEMISTRY MAGAZINE THAT
7 LISTS THE CHEMICAL CONSTITUENTS OF TOBACCO AND TOBACCO SMOKE
8 AND ALSO DESCRIBES THINGS THAT ARE SUSPECTED OF BEING
9 CARCINOGENS.

10 DEFENDANT'S EXHIBIT 2812 IS PART OF A BOOK THAT
11 WAS PUBLISHED IN 1962 THAT DESCRIBES THE CHEMISTRY OF
12 TOBACCO SMOKE. IT POINTS OUT THAT:

13 "THERE HAVE BEEN A LOT OF INVESTIGATIONS CARRIED
14 OUT ON TOBACCO SMOKE, THAT THERE ARE COMPOUNDS
15 BELIEVED TO BE CONSIDERED CARCINOGENS, BUT THAT
16 MORE ANALYTICAL WORK IS NEEDED TO ASCERTAIN MORE
17 PRECISE KNOWLEDGE, AND THAT IT'S GENERALLY AGREED
18 THAT THE CONCENTRATIONS ARE PRESENT IN TOO SMALL
19 AMOUNTS TO ACCOUNT FOR THE OBSERVED ACTIVITY IN
20 THE EXPERIMENTS."

21 THAT WAS THE BOOK TOBACCO AND HEALTH PUBLISHED BY
22 ROSENTHAL AND JAMES. DR. ELLIS DESCRIBED IT. AND IF YOU GO
23 BACK TO THE REFERENCES, THEY EVEN DESCRIBE WHERE THEY GOT
24 THE INFORMATION ON THE SUBSTANCES IN SMOKE. SOME OF IT CAME
25 FROM THE GOVERNMENT, SOME OF IT CAME FROM THE CIGARETTE
COMPANIES.

27 AND THEN YOU'LL RECALL EXHIBIT 2786 WAS THE LIST
28 OF CHEMICAL CONSTITUENTS IN TOBACCO SMOKE THAT PHILIP MORRIS

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1 PREPARED AND SENT TO THE SURGEON GENERAL IN '63. AND IF YOU
2 THINK ABOUT IT, AS DR. ELLIS SAID, IF YOU HAVE THE RIGHT
3 KNOWLEDGE, IF YOU ARE A CHEMIST AND IF YOU HAVE THE RIGHT
4 EQUIPMENT, YOU DON'T NEED TO WORK FOR A TOBACCO COMPANY TO
5 FIGURE OUT WHAT'S IN CIGARETTE SMOKE. YOU CAN CONDUCT AN
6 ANALYSIS. YOU CAN CONDUCT AN EXPERIMENT TO LOOK TO SEE
7 WHAT'S IN SMOKE.

8 WHAT WAS IN SMOKE HAS NEVER BEEN A SECRET. THE
9 THINGS THAT ARE IN SMOKE THAT ARE SUSPECTED OF BEING
10 CARCINOGENS ARE THERE, AS DR. ELLIS TOLD YOU, BECAUSE YOU'RE
11 BURNING AN ORGANIC MATERIAL THAT GIVES RISE TO ALL THE SAME
12 COMPOUNDS THAT YOU FIND WHEN YOU BURN WOOD, WHEN YOU BURN
13 PAPER, WHEN YOU COOK CERTAIN FOODS.

14 SO THERE'S REALLY ALMOST NOTHING ABOUT WHAT'S IN
15 SMOKE THAT WAS A SURPRISE OR A SECRET BACK IN THE '50S AND
16 THE '60S TO ANYONE. THERE WERE SOME DOUBTS AS TO WHETHER
17 THERE WAS ENOUGH OF THOSE THINGS IN SMOKE TO CREATE THE
18 RESPONSE THEY SAW IN THESE ANIMAL EXPERIMENTS. BUT IT'S
19 INFORMATION THAT EVEN PHILIP MORRIS WAS PUTTING TOGETHER AND
20 GIVING TO PEOPLE SO THEY COULD DO THIS KIND OF RESEARCH AND

21 FORM IDEAS ABOUT REDUCING THE THINGS IN SMOKE PEOPLE THOUGHT
22 MIGHT CREATE RISKS TO SMOKERS.

23 IN THE SAME DOCUMENT, PLAINTIFF'S 1-70, DR.

24 WAKEHAM POINTS OUT:

25 "THERE MIGHT BE WAYS TO REDUCE THESE CARCINOGENS

26 IN TOBACCO SMOKE."

27 DR. ELLIS DESCRIBES WHAT A PRECURSOR IS,

28 SOMETHING IN THE TOBACCO THAT GIVES RISE TO THE FORMATION OF

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1 THIS COMPOUND WHEN YOU BURN IT.

2 "FIGURE OUT WHERE YOU CAN MODIFY HOW THOSE
3 THINGS ARE CREATED. EXPERIMENTAL TOBACCOES THAT
4 PRODUCE DIFFERENT SUBSTANCES, DIFFERENT
5 CARCINOGENS AND ANTICARCINOGENS." DR. ELLIS TOLD
6 YOU ABOUT THAT. "SEPARATE CARCINOGENS IN SMOKE
7 USING PARTICULATE FRACTIONS."

8 THIS WAS ALL WRITTEN IN 1961. AND IT'S ALL THE
9 KINDS OF THINGS THAT DR. ELLIS TOLD YOU THE COMPANY STARTED
10 TO DO AND CONTINUED TO DO THROUGHOUT THIS TIME PERIOD AND
11 THROUGHOUT THE TIME SHE HAS BEEN THERE. AGAIN, IT'S WHAT
12 YOU WOULD EXPECT A REASONABLE MANUFACTURER TO DO WHO IS
13 SELLING A PRODUCT THAT HAS RISK ASSOCIATED WITH IT, THAT
14 OTHER PEOPLE ARE STUDYING AND PEOPLE ARE POINTING OUT WAYS
15 TO IMPROVE THE PRODUCT OR REDUCE THE RISK.

16 THE NEXT PIECE OF EVIDENCE ON THE ISSUE IS
17 DEFENDANT'S EXHIBIT 2233, AND THIS WAS THE DOCUMENT THAT DR.
18 ELLIS AND I SPENT SOME TIME TALKING ABOUT. IT'S A PHILIP
19 MORRIS RESEARCH REPORT FROM DR. BAVLEY TO THE RESEARCH
20 COMMITTEE. IT'S ENTITLED "A MEDICALLY ACCEPTABLE
21 CIGARETTE." AND HE LISTS AGAIN SOME OF THESE THINGS
22 CONSIDERED TO BE DETRIMENTAL TO THE HEALTH OF SMOKERS.

23 AND REMEMBER WHAT DR. ELLIS SAID? ALL OF THESE
24 THINGS OCCUR WHEN YOU BURN TOBACCO OR WHEN YOU BURN PAPER.
25 AND IT'S ALMOST IMPOSSIBLE TO REMOVE THEM ONE AT A TIME.
26 WE'LL TALK ABOUT THAT IN A MINUTE. THE AUTHOR POINTS OUT:

27 "A MEDICALLY ACCEPTABLE CIGARETTE WOULD
28 OBVIOUSLY BE ONE WHOSE SMOKE CONTAINED LITTLE OR

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1 NONE OF THE ABOVE SUBSTANCES."

2 AND THE AUTHOR POINTS OUT, AS YOU REMEMBER, 10
3 THINGS THAT COULD BE DONE TO PRODUCE SUCH A CIGARETTE. AND
4 DR. ELLIS TALKED ABOUT EACH ONE OF THEM. AND SHE TOLD YOU
5 SOME OF THEM IN 1962 THEY WERE LOGICAL IDEAS, GREAT IDEAS,
6 BUT THERE WASN'T ANY TECHNOLOGY THAT EXISTED IN ANY WAY
7 WHERE YOU COULD DO IT.

8 REMEMBER, DR. ELLIS SAID A LOT OF THE TECHNIQUES
9 AND TECHNOLOGY THAT WAS CREATED OR INVENTED TO EVEN MEASURE
10 THESE THINGS IN SMOKE WAS SOMETHING THAT PHILIP MORRIS OR
11 OTHER CIGARETTE COMPANIES ACTUALLY INVENTED AND CREATED. SO
12 SOME OF THE STUFF YOU COULD DO IN '62, AND THEY STARTED TO
13 DO IT.

14 AND SOME OF IT TOOK A WHILE TO DO. IT TAKES A
15 WHILE TO DO THIS KIND OF THING. SOME OF IT, SHE SAID THEY
16 DID IT AND IT TURNED OUT IT DIDN'T WORK THE WAY THEY THOUGHT
17 IT WOULD. THAT HAPPENS WHEN YOU MAKE A PRODUCT AND TRY TO
18 CHANGE IT.

19 SHE ALSO TOLD YOU -- REMEMBER, SHE TOLD YOU ABOUT
20 THIS CIGARETTE THAT HEATS INSTEAD OF BURNS TOBACCO. ONE OF
21 THE WAYS TO REDUCE ALL THESE THINGS IN SMOKE WOULD BE CHANGE
22 THE TEMPERATURE AT WHICH TO BURN THE TOBACCO. SHE SAID IT
23 SOUNDED EASY. IT TOOK THEM A LONG TIME TO FIGURE OUT HOW TO

24 DO IT. IN FACT, IT'S SOMETHING THEY HAVE ONLY RECENTLY
25 CREATED THE TECHNOLOGY TO DO. IT'S SOMETHING THAT THEY TALK
26 ABOUT RIGHT HERE (INDICATING), NO. 4.

27 SO, YOU KNOW, SCIENCE AND TECHNOLOGY DOESN'T ALL
28 HAPPEN AT ONCE. YOU HAVE TO TAKE IT A STEP AT A TIME. AND

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1 WITHIN A FEW YEARS OF THIS INFORMATION COMING OUT ABOUT WHAT
2 IT IS IN SMOKE THAT PEOPLE HAVE SUSPICIONS ABOUT, YOU SEE
3 PHILIP MORRIS TRYING TO REDUCE OR REMOVE THOSE THINGS FROM
4 SMOKE IN AN EFFORT TO CREATE A CIGARETTE THAT DR. WYNDER
5 PREDICTED WOULD REDUCE THE RISK OF CANCER (INDICATING).

6 AND YOU HEARD DR. ELLIS TELL YOU THAT THERE ARE A
7 COUPLE OF WAYS -- TWO MAJOR THINGS, TWO MAJOR WAYS TO DO
8 IT. ONE IS SELECTIVE REMOVAL, IF YOU CAN GO IN THERE AND
9 SELECTIVELY REMOVE THOSE CHEMICALS THAT PEOPLE HAD
10 SUSPICIONS ABOUT. I'LL TALK ABOUT THAT A LITTLE LATER. BUT
11 SHE TOLD YOU THAT THAT IS HARD TO DO, BECAUSE ALL THESE
12 THINGS ARE CREATED AT THE SAME TIME AND IN SMALL AMOUNTS.

13 SO WHAT PHILIP MORRIS DID AND WHAT THE GOVERNMENT
14 AND OTHERS SUGGESTED THAT THEY SHOULD DO IS TO GENERALLY
15 REDUCE EVERYTHING. THAT'S WHAT DR. WYNDER IS SAYING HERE,
16 IN ESSENCE. "JUST DROP IT ALL DOWN AS MUCH AS YOU CAN
17 BECAUSE," AS DR. ELLIS SAID, "IF MORE IS BAD, LESS IS
18 BETTER."

19 AND GIVEN THE TECHNOLOGY AND GIVEN WHAT YOU'RE
20 DEALING WITH IN TERMS OF TOBACCO BEING AN ORGANIC PRODUCT,
21 IT MADE SENSE TO REDUCE EVERYTHING, WHICH IS EXACTLY WHAT
22 PHILIP MORRIS DID. AND I'M GOING TO SHOW YOU HOW THEY DID
23 IT AND WHAT OTHER PEOPLE INSIDE AND THE GOVERNMENT AND OTHER
24 PLACES WERE SAYING ABOUT IT, WHY THEY DID IT.

25 REMEMBER, DR. ELLIS DESCRIBED THESE TECHNIQUES.
26 YOU CAN PUT A FILTER TO FILTER OUT TAR AND NICOTINE. YOU
27 CAN VENTILATE THE FILTER TO DILUTE THE SMOKE. YOU CAN
28 PERMEATE THE PAPER SO THAT AIR COMES IN AND AIR GOES OUT AND

0103

1 IT DILUTES THE SMOKE.

2 YOU CAN RECONSTITUTE TOBACCO. SHE TOLD YOU WHAT
3 THAT WAS. YOU TAKE STEMS THAT HAVE LOWER AMOUNTS OF TAR AND
4 NICOTINE OR LOWER AMOUNTS OF NICOTINE IN THE THINGS THAT
5 PRODUCE THE TAR, MAKE PAPER OUT OF THEM, PUT THEM IN THE
6 CIGARETTE. YOU CAN EXPAND THE TOBACCO, PUFF IT UP. AND YOU
7 CAN MAKE A CIGARETTE NARROWER.

8 SHE SAID THAT YOU REALLY DON'T DO ALL OF THESE
9 THINGS IN ANY ONE CIGARETTE AND SOME CIGARETTES HAVE MORE OF
10 ONE THAN MORE OF ANOTHER. THAT IS HOW YOU GET DIFFERENT
11 LEVELS OF TAR AND NICOTINE IN DIFFERENT TYPES OF CIGARETTES.

12 REMEMBER, SHE EVEN SAID YOU CAN USE THESE
13 TECHNIQUES TO REDUCE THE TAR AND NICOTINE IN UNFILTERED
14 CIGARETTES, AND THEY HAVE. USING EXPANDED TOBACCO AND
15 RECONSTITUTED TOBACCO, THE AMOUNT OF TAR AND NICOTINE IN AN
16 AVERAGE UNFILTERED CIGARETTE TODAY IS LOWER THAN IT WAS AT
17 THE TIME THESE KINDS OF ARTICLES WERE WRITTEN (INDICATING).

18 DEFENDANT'S EXHIBIT 2817 IS PART OF A HEARING
19 REVIEWING THE PROGRESS MADE TOWARDS THE DEVELOPMENT AND
20 MARKETING OF A LESS HAZARDOUS CIGARETTE IN CONGRESS, 1967.
21 AND THE REPORT POINTS OUT THAT A GROUP OF SCIENTISTS
22 REVIEWED AND DISCUSSED INFORMATION AT THE INVITATION OF THE
23 SURGEON GENERAL, AND CONCLUDED THAT:

24 "THE PREPONDERANCE OF SCIENTIFIC EVIDENCE
25 STRONGLY SUGGESTS THAT THE LOWER THE 'TAR' AND
26 NICOTINE CONTENT OF CIGARETTE SMOKE, THE LESS

27 HARMFUL WOULD BE THE EFFECT."
28 THE SAME THING DR. WYNDER SAID IN 1957 THE

0104

1 GOVERNMENT IS SAYING IN 1967. THEY RECOMMENDED TO THE
2 SURGEON GENERAL THAT:

3 "ACTION BE ENCOURAGED WHICH WILL RESULT IN THE
4 PROGRESSIVE REDUCTION OF THE 'TAR' AND NICOTINE
5 CONTENT OF CIGARETTE SMOKE."

6 ONE OF THE THINGS THAT HAD TO HAPPEN WAS THERE
7 HAD TO BE A STANDARDIZED METHOD BY WHICH YOU COULD MEASURE
8 THE AMOUNT OF TAR AND NICOTINE IN CIGARETTE SMOKE.
9 REMEMBER, ALL THE WAY BACK TO DR. POLLAY AND EVEN DR. DAVIS
10 AND DR. BENOWITZ TALKED ABOUT THE FTC METHOD FOR MEASURING
11 TAR AND NICOTINE IN CIGARETTE SMOKE.

12 BEFORE THE FTC, THE FEDERAL TRADE COMMISSION, PUT
13 THIS METHOD TOGETHER, ANYBODY MEASURING TAR AND NICOTINE
14 WERE USING DIFFERENT TECHNIQUES AND IT WAS HARD TO COMPARE
15 AND CONTRAST THINGS.

16 IT'S A LOT LIKE -- I HAVE USED THE ANALOGY
17 BEFORE -- THE GAS MILEAGE INFORMATION YOU GET ON YOUR CAR.
18 THE EPA CONDUCTS ONE TEST ON EVERY TYPE OF CAR AND COMES UP
19 WITH A NUMBER, YOUR AVERAGE MILES FOR DRIVING IN THE CITY,
20 YOUR AVERAGE MILES FOR DRIVING ON THE HIGHWAY. THEY ALWAYS
21 TELL YOU TWO THINGS, THAT THEY USE THE SAME TEST FOR EVERY
22 DIFFERENT TYPE OF CAR AND THAT YOUR RESULTS MAY DIFFER.
23 EVERYBODY DRIVES A LITTLE DIFFERENTLY. IT'S AN AVERAGE.
24 IT'S SOMETHING YOU CAN USE TO COMPARE THINGS.

25 WELL, THAT IS WHAT THE FEDERAL TRADE COMMISSION
26 DID IN 1967. THIS IS DEFENDANT'S EXHIBIT 2823. THEY PUT
27 OUT A PRESS RELEASE SAYING:

28 "WE'RE NOW GOING TO START CIGARETTE TESTING.

0105

1 WE'RE GOING TO USE ONE METHOD TO TEST EVERYBODY'S
2 CIGARETTES, SO PEOPLE CAN COMPARE HOW MUCH TAR
3 AND NICOTINE IS COMING FROM INDIVIDUAL
4 CIGARETTES."

5 AND THE FTC POINTS OUT THAT THEY HAVEN'T TRIED TO
6 GAUGE THE AMOUNT OF SMOKE WHICH THE AVERAGE SMOKER WILL GET
7 FROM ANY PARTICULAR CIGARETTE, BECAUSE NO TWO HUMAN SMOKERS
8 SMOKE IN THE SAME WAY. PEOPLE INHALE DIFFERENTLY. EVEN
9 INDIVIDUALS SMOKE DIFFERENTLY AT DIFFERENT POINTS IN TIME.
10 SOME TAKE LONG PUFFS, SOME TAKE SHORT PUFFS, AND THAT
11 VARIATION AFFECTS THE TAR AND NICOTINE FROM THE SMOKE THAT
12 IS GENERATED.

13 SO WHEN THE FTC PUT THIS TEST TOGETHER, THEY
14 NEVER SAID: "THIS IS EXACTLY WHAT ANY PARTICULAR SMOKER IS
15 GOING TO GET WHEN THEY SMOKE." THEY EVEN POINT OUT THAT
16 INDIVIDUAL SMOKERS GET DIFFERENT AMOUNTS OF TAR AND NICOTINE
17 DEPENDING ON HOW THEY ARE SMOKING, THAT PEOPLE SMOKE
18 DIFFERENTLY.

19 THAT INFORMATION ABOUT PEOPLE SMOKING DIFFERENTLY
20 CAME IN PART FROM PHILIP MORRIS. IN DEFENDANT'S EXHIBIT
21 2122, THERE'S A SUBMISSION MADE BY PHILIP MORRIS AND OTHER
22 CIGARETTE COMPANIES IN 1966 TO THE FEDERAL TRADE COMMISSION
23 WHERE THEY POINT OUT THAT, YOU KNOW:

24 "IF YOU ARE GOING TO DO THIS TEST, ONE THING YOU
25 NEED TO KNOW IS IT'S NOT EXACTLY A TEST THAT WILL
26 MEASURE THE WAY INDIVIDUAL SMOKERS SMOKE, BECAUSE
27 NO TWO HUMAN SMOKERS SMOKE IN THE SAME WAY.
28 INDIVIDUALS DON'T ALWAYS SMOKE IN THE SAME

0106

1 FASHION. THAT VARIATION AFFECTS THE QUANTITY AND
2 THE SMOKE GENERATED."

3 THE FEDERAL TRADE COMMISSION QUOTES ALMOST
4 VERBATIM THE INFORMATION THEY GOT FROM PHILIP MORRIS. THE
5 SUGGESTION THAT THIS FEDERAL TRADE COMMISSION METHOD IS
6 SOMEHOW A TRICK OR UNFAIR OR NOT ACCURATE IS NOT SOMETHING
7 THAT ORIGINATED AT PHILIP MORRIS. PHILIP MORRIS, LIKE OTHER
8 TOBACCO COMPANIES, PROVIDED INFORMATION TO THE FEDERAL TRADE
9 COMMISSION THAT SAID:

10 "IF YOU ARE GOING TO USE THIS METHOD, YOU NEED
11 TO KNOW THAT PEOPLE SMOKE DIFFERENTLY.

12 THE FEDERAL TRADE COMMISSION, IN ITS PRESS
13 RELEASE, WHEN IT SAID "WE'RE GOING TO USE THIS METHOD,"
14 SAID:

15 "WE KNOW PEOPLE SMOKE DIFFERENTLY, BUT IT'S JUST
16 A POINT OF COMPARISON. IT'S SOMETHING WE CAN USE
17 TO COMPARE HOW MUCH SMOKE IS IN ONE CIGARETTE
18 WITH ANOTHER BRAND OF CIGARETTES."

19 BUT ALONG THE WAY, PHILIP MORRIS USED THESE
20 TECHNIQUES TO REDUCE THE AMOUNT OF TAR AND NICOTINE THAT'S
21 IN THE AVERAGE CIGARETTE.

22 THERE CAME A POINT IN TIME IN THE 1960S AND
23 1970S -- AND THIS IS DEFENDANT'S EXHIBITS 2043, 2044, 2045
24 2046 AND 2052 -- WHERE THE NATIONAL CANCER INSTITUTE AND THE
25 CIGARETTE COMPANIES -- THE NATIONAL CANCER INSTITUTE THAT
26 WAS PART OF THE GOVERNMENT -- PUT A GROUP TOGETHER CALLED
27 THE TOBACCO WORKING GROUP, AND THE REPORTS WERE ALL ENTITLED
28 "TOWARD A LESS HAZARDOUS CIGARETTES."

0107

1 THE IDEA BEING "LET'S GET ALL THESE PEOPLE
2 TOGETHER." AS DR. ELLIS TOLD YOU, "LET'S SEE IF THERE IS A
3 WAY TO MAKE CIGARETTES LESS HAZARDOUS." AT THE END OF THIS
4 COMMITTEE'S WORK, DR. ELLIS AND DR. DAVIS I THINK TOLD YOU
5 THAT THEY CONCLUDED THERE IS NO WAY TO MAKE A SAFE
6 CIGARETTE, BUT THERE ARE WAYS TO REDUCE THE RISKS ASSOCIATED
7 WITH SMOKING.

8 AND THE TOBACCO WORKING GROUP, AS DR. ELLIS TOLD
9 YOU, MADE SOME RECOMMENDATIONS. THEY SAID: "YOU SHOULD USE
10 RECONSTITUTED TOBACCO, INCLUDING STEMS." THEY SAID:
11 "INCREASE THE POROSITY IN CIGARETTE PAPER. MAKE THE
12 CIGARETTES BURN FASTER. USE EXPANDED TOBACCO. VENTILATE,
13 DILUTE THE FILTERS, USE MORE FILTERS, REDUCE TAR AND
14 NICOTINE LEVELS AND REDUCE PHENOLS."

15 REMEMBER, DR. ELLIS SAID THAT THERE IS AN AREA
16 WHERE YOU CAN SPECIFICALLY OR SELECTIVELY REDUCE SOMETHING
17 FROM CIGARETTE SMOKE, AND THAT IS PHENOLS. YOU DO THAT
18 THROUGH CELLULOSE ACETATE FILTERS.

19 AND WHAT DR. ELLIS SAID WAS EVERY ONE OF THESE
20 RECOMMENDATIONS -- WHICH RESULTED FROM THE TOBACCO WORKING
21 GROUP, THE NATIONAL CANCER INSTITUTE -- EVERY ONE OF THESE
22 RECOMMENDATIONS WAS SOMETHING PHILIP MORRIS HAD ALREADY
23 DEVELOPED OR USED IN ITS PRODUCTS. AND THAT AFTER THESE
24 SIX, SEVEN, EIGHT YEARS OF RESEARCH, THE NATIONAL CANCER
25 INSTITUTE TOBACCO WORKING GROUP DIDN'T MAKE ANY
26 RECOMMENDATIONS FOR MAKING LESS HAZARDOUS CIGARETTES THAT
27 HADN'T ALREADY BEEN PUT INTO THE PRODUCTS BY PHILIP MORRIS.
28 AGAIN, YOU'VE GOT TO JUDGE THE REASONABLENESS OF

0108

1 PHILIP MORRIS' CONDUCT, JUDGE IT AGAINST WHAT PEOPLE OUTSIDE
2 OF THE COMPANY WERE DOING, PEOPLE WHO OBVIOUSLY HAVE NO

3 INTEREST IN SELLING CIGARETTES, THE GOVERNMENT, THE NATIONAL
4 CANCER INSTITUTE.

5 WHAT WERE THEY TELLING PHILIP MORRIS TO DO? WHAT
6 WERE THEY SAYING CIGARETTE COMPANIES LIKE PHILIP MORRIS
7 SHOULD DO TO CREATE A LESS HAZARDOUS CIGARETTE? EVERYTHING
8 THEY SAID WAS SOMETHING DR. ELLIS TOLD YOU PHILIP MORRIS HAD
9 ALREADY DONE. AND IN FACT, IT WAS THE KINDS OF THINGS THAT
10 PHILIP MORRIS HAD ALREADY STARTED DOING BACK IN THE '60S, AS
11 SOON AS THIS EVIDENCE STARTED SUGGESTING THAT REDUCING THE
12 AMOUNT OF TAR WOULD BE A STEP IN THE RIGHT DIRECTION.

13 NOW, ALONG THE WAY, THERE WERE OTHER PEOPLE WHO
14 ENCOURAGED PHILIP MORRIS AND OTHERS TO CONTINUE USING THESE
15 TYPES OF TECHNIQUES TO REDUCE THE AMOUNT OF TAR AND NICOTINE
16 IN CIGARETTE SMOKE, BECAUSE THEY BELIEVED IT WOULD REDUCE
17 THE RISKS ASSOCIATED WITH SMOKING. THIS IS DEFENDANT'S
18 EXHIBIT 2039.

19 AND REMEMBER, A COUPLE OF WITNESSES, ESPECIALLY
20 DR. ELLIS, TALKED ABOUT THIS CONFERENCE CALLED "THE BANBURY
21 CONFERENCE," WHERE PEOPLE LIKE DR. WYNDER AND OTHERS GOT
22 TOGETHER TO TALK ABOUT A SAFE CIGARETTE. THIS IS DR.
23 HAMMOND, THE SAME DR. HAMMOND BACK IN THE '50S, WHO WAS AT
24 THE CONFERENCE AND SAID THAT:

25 "THE PREPONDERANCE OF SCIENTIFIC EVIDENCE
26 STRONGLY SUGGESTS THE LOWER THE TAR AND NICOTINE
27 CONTENTS IN CIGARETTES, THE LESS HARMFUL WOULD BE
28 THE EFFECTS."

0109

1 SO HERE IN 1980, PEOPLE, WELL-RESPECTED,
2 DISTINGUISHED AUTHORITIES UNCONNECTED TO THE TOBACCO
3 INDUSTRY ARE STILL ENCOURAGING THE REDUCTION OF TAR AND
4 NICOTINE IN CIGARETTE SMOKE.

5 THE 1979 SURGEON GENERAL'S REPORT, WHICH IS
6 EXHIBIT 2828-D, POINTS OUT THAT:

7 "THERE IS SUBSTANTIAL EXPERIMENTAL EVIDENCE AND
8 SOME SUPPORTING DATA FROM RETROSPECTIVE STUDIES
9 THAT CIGARETTES WITH REDUCED TAR AND NICOTINE
10 SHOULD IN PRINCIPLE HAVE REDUCED RISKS OF HEALTH
11 HAZARDS."

12 SO REMEMBER, DR. ELLIS SAID ONE OF THE THINGS
13 PHILIP MORRIS DID OVER THE YEARS WAS ATTEND THESE KINDS OF
14 MEETINGS, READ THESE KINDS OF PAPERS AND CONTINUE TO DO THE
15 THINGS THAT PHILIP MORRIS HAD DEVELOPED AND THAT OTHERS HAD
16 SUGGESTED TO DO TO REDUCE THE RISKS ASSOCIATED WITH
17 SMOKING. AGAIN, YOU'VE GOT TO JUDGE THE CONDUCT OF PHILIP
18 MORRIS IN THIS CONTEXT.

19 AT THE SAME CONFERENCE, IT WAS SAID THAT:
20 "THE MOST DRAMATIC EVENT IN THE HISTORY OF
21 SMOKING HAS BEEN THE REDUCTION OF THE SALES-
22 WEIGHTED AVERAGES OF TAR AND NICOTINE DELIVERY
23 PER CIGARETTE TO ABOUT HALF THE VALUES OF 15
24 YEARS AGO."

25 THIS IS 1980. IN 1957, DR. WYNDER SAYS "CUT IT
26 40 PERCENT." BY 1980, IT'S BEEN CUT 50 PERCENT. IF YOU GO
27 TO 1989, AND YOU RECALL WHAT DR. ELLIS SAID, IT'S ACTUALLY
28 BEEN CUT ALMOST 70 PERCENT. CIGARETTES SOLD TODAY HAVE 70

0110

1 PERCENT OF THE TAR AND NICOTINE ON A SALES-WEIGHTED AVERAGE,
2 WHEN YOU AVERAGE ALL THE BRANDS THAT ARE BEING SOLD, THAN
3 THEY DID IN THE 1950S.

4 NOW, AT THE SAME TIME, THE SURGEON GENERAL AND
5 OTHERS HAVE SUGGESTED THAT "WHEN YOU" -- AND THIS IS 2828-E,

6 1981 -- "THAT REDUCING THE AMOUNT OF TAR AND NICOTINE AND
7 CHANGING THE WAY TO MAKE CIGARETTES, USING THINGS
8 LIKE RECONSTITUTED TOBACCO AND EXPANDED TOBACCO
9 HAS REDUCED THE CARCINOGENIC POTENTIAL OF LEADING
10 CIGARETTE BRANDS DURING THE LAST 20 YEARS." THE
11 WHOLE POINT.

12 1981, EXHIBIT 2828. THERE'S ANOTHER SUGGESTION
13 THAT SAYS:

14 "A MAJOR PART OF THE EVIDENCE SUGGESTING THAT
15 LOWER-TAR CIGARETTES MAY BE LESS HAZARDOUS IS
16 BECAUSE THERE IS A BELIEF," AS DR. ELLIS SAID,
17 "THAT IF MORE IS BAD, LESS IS BETTER."

18 SO THROUGHOUT THIS PERIOD OF TIME, PHILIP MORRIS
19 IS REDUCING THE AMOUNT OF TAR AND NICOTINE IN CIGARETTE
20 SMOKE. THERE ARE PEOPLE FROM THE SURGEON GENERAL'S OFFICE
21 AND OTHER DISTINGUISHED AUTHORITIES ENCOURAGING THEM TO DO
22 THAT.

23 AND THERE ARE PEOPLE WHO THEN START TO DO STUDIES
24 WHERE THEY START TO STUDY A GROUP OF PEOPLE WHO ARE USING
25 THESE CIGARETTES TO SEE IF THEIR RISK ACTUALLY IS REDUCED.
26 AND THOSE STUDIES -- OH, BY THE WAY, HERE IS THE SURGEON
27 GENERAL'S REPORT IN 1989 AGAIN, AND IT KIND OF CONNECTS SOME
28 OF THESE TECHNIQUES THAT WE TALKED ABOUT -- RECONSTITUTED

0111
1 TOBACCO, POROUS PAPER, EXPANDED TOBACCO AND VENTILATION --
2 TO THE REDUCTIONS IN TAR AND NICOTINE.

3 THESE AREN'T JUST GIMMICKS APPARENTLY THAT ARE
4 BEING ADDED TO CIGARETTES TO SELL MORE CIGARETTES. THEY'RE
5 ACTUALLY THINGS THAT ARE REDUCING THE AMOUNT OF TAR AND
6 NICOTINE FROM THE SMOKE IN A WAY THAT THE SURGEON GENERAL
7 AND OTHERS THINK IS A STEP IN THE RIGHT DIRECTION.

8 SO ABOUT THIS TIME, PEOPLE STARTED TRYING TO DO
9 STUDIES. THEY WANTED TO START LOOKING AT GROUPS OF PEOPLE
10 TO SEE IF THE PEOPLE WHO ARE SMOKING THESE CIGARETTES
11 ACTUALLY DO HAVE A REDUCED RISK. THEY PREDICTED IT AND NOW
12 THEY ARE GOING TO STUDY IT.

13 TWO THINGS I WANT TO TALK ABOUT IN CONNECTION
14 WITH THAT. YOU HEARD SOME EVIDENCE IN THE CASE ABOUT
15 SOMETHING CALLED COMPENSATION, WHERE PEOPLE SMOKE CIGARETTES
16 DIFFERENTLY IF THEY'RE LOWER-TAR AND LOWER-NICOTINE
17 CIGARETTES.

18 AND THAT'S SOMETHING YOU ALSO HEARD ABOUT,
19 OCCLUSION, WHERE PEOPLE COVER UP THESE LITTLE HOLES, YOU
20 KNOW, INADVERTENTLY OR UNINTENTIONALLY AND THEREFORE GET
21 MORE TAR AND NICOTINE THAN THEY THINK THEY DO.

22 ON THE COVERING UP THE HOLES, REMEMBER WHAT DR.
23 ELLIS SAID? JUST BECAUSE YOU COVER UP HALF THE HOLES
24 DOESN'T MEAN YOU GET TWICE AS MUCH TAR AND NICOTINE. YOU
25 STILL GET THE BENEFIT OF THAT TECHNIQUE, BECAUSE OTHER
26 THINGS HAPPEN. MORE AIR COMES THROUGH OTHER HOLES. MORE
27 AIR COMES THROUGH THE REST OF THE CIGARETTE. SO JUST
28 BECAUSE YOU COVER UP SOME HOLES DOESN'T MEAN YOU NECESSARILY

0112
1 GET MORE TAR AND NICOTINE.

2 BUT THE FACT THAT PEOPLE MIGHT DO THAT OR THE
3 FACT THAT PEOPLE MIGHT COMPENSATE WAS NOT A SECRET. AND IT
4 WAS SOMETHING THE SURGEON GENERAL TALKED ABOUT AGAIN IN
5 EXHIBIT 2828-D. THIS IS THE 1979 SURGEON GENERAL'S REPORT,
6 WHERE THE SURGEON GENERAL POINTS OUT THAT:

7 "IT IS POSSIBLE FOR LOW TAR AND NICOTINE SMOKERS
8 TO INHALE MORE OF THESE CONSTITUENTS THAN SMOKERS

9 OF CIGARETTES WITH HIGH TAR AND NICOTINE BECAUSE
10 THE SMOKERS MAY INHALE MORE DEEPLY OR SMOKE THE
11 CIGARETTE FURTHER DOWN THE BUTT OR COMPENSATE FOR
12 THE LOWER AMOUNT OF NICOTINE."

13 SO THE ISSUE OF COMPENSATION IS SOMETHING PEOPLE
14 KNEW ABOUT. THE ISSUE OF OCCLUSION, COVERING UP THOSE
15 HOLES, IS DISCUSSED IN THE SURGEON GENERAL'S REPORT IN 1982
16 WHICH IS 2828-F. AGAIN, NOT SECRET. NOT SOME TRICK THAT
17 PHILIP MORRIS IS TRYING TO PLAY ON PEOPLE. IT'S SOMETHING
18 THAT EVERYBODY RECOGNIZED IS POSSIBLE.

19 BUT WHAT THE SURGEON GENERAL AND OTHERS SAY,
20 THOUGH, IS:

21 "EVEN IF ALL OF THAT HAPPENS, THE RISKS
22 ASSOCIATED WITH SMOKING THESE LOWER TAR,
23 LOWER NICOTINE CIGARETTES SHOULD BE REDUCED."

24 1982, SURGEON GENERAL'S REPORT, 2828-F.

25 AND SO WHAT HAPPENED IS THEY DID THESE STUDIES.
26 AND IN THESE STUDIES, THEY STUDIED GROUPS OF PEOPLE AND THEY
27 TRIED TO DETERMINE WHETHER USING THESE TYPE -- THESE TYPES
28 OF PRODUCTS WOULD REDUCE RISK.

0113

1 AND IN THESE STUDIES, PRESUMABLY IF ALL OF THAT
2 IS HAPPENING, IF PEOPLE ARE COMPENSATING, IF PEOPLE ARE
3 COVERING THE HOLES UP, IF PEOPLE ARE INHALING MORE DEEPLY,
4 IF ALL THAT HAPPENS, IT WOULD BE HAPPENING IN PEOPLE BEING
5 STUDIED, BECAUSE THEY ARE SMOKING THESE CIGARETTES.

6 BUT EVEN IF ALL THAT DOES HAPPEN, EXHIBIT 2818 IS
7 A 1989 REPORT FROM THE AMERICAN CANCER SOCIETY THAT SAYS:

8 "IN NUMEROUS CASE-CONTROL AND PROSPECTIVE
9 STUDIES PERFORMED IN THE UNITED STATES AND
10 EUROPE" DEMONSTRATE THAT "THE RELATIVE RISK FOR
11 LUNG CANCER HAS CONSISTENTLY BEEN FOUND TO BE
12 LOWER AMONG BOTH MEN AND WOMEN WHO SMOKE
13 LOWER-YIELD CIGARETTES."

14 "LOWER-YIELD CIGARETTES," WHICH IS WHAT YOU
15 HEARD PEOPLE DEFINE AS THESE LOW-TAR, LOW-NICOTINE
16 CIGARETTES.

17 1989, DEFENDANT'S EXHIBIT 2012, AN ARTICLE -- A
18 PAPER BY DR. SAMET THAT TALKS ABOUT THE AMERICAN CANCER
19 SOCIETY STUDIES AND DR. WYNDER'S STUDIES.

20 "ONGOING STUDIES HAVE CONSISTENTLY SHOWN THAT
21 SMOKERS OF LOW-TAR PRODUCTS HAVE REDUCED LUNG
22 CANCER RISK, INCLUDING" AND THEY POINT OUT PEOPLE
23 SMOKE DIFFERENTLY SOMETIMES WHEN THEY SMOKE THOSE
24 CIGARETTES.

25 SO ALL OF THAT IS TO SAY THAT -- LET ME JUST BACK
26 UP FOR A MINUTE. REMEMBER DR. DAVIS? "YOU KNOW WHAT, IT
27 TURNS OUT SOME OF THOSE STUDIES MAY BE WRONG." AND HE MAY
28 BE RIGHT. BUT THE ISSUE IS REASONABLENESS AND STATE OF

0114

1 MIND. AND OVER THE TIME PERIOD THAT PHILIP MORRIS WAS DOING
2 THIS, THEY WERE DOING IT IN A WAY THAT WAS ENCOURAGED BY THE
3 GOVERNMENT.

4 THEY WERE DOING IT IN A WAY THAT THE SURGEON
5 GENERAL WAS AWARE OF AND SAYING FAVORABLE THINGS ABOUT.
6 THEY WERE DOING IT IN A WAY THAT PEOPLE LIKE DR. HAMMOND AND
7 DR. WYNDER WERE SAYING WAS A STEP IN THE RIGHT DIRECTION.
8 AND THEY WERE DOING IT AT A TIME WHEN STUDIES WERE BEING
9 PUBLISHED THAT SUGGESTED THAT THEY WERE ACTUALLY REDUCING
10 THE RISK ASSOCIATED WITH DISEASE.

11 SO AGAIN, IN DETERMINING WHETHER GENERALLY

12 REDUCING THE TAR AND NICOTINE OF CIGARETTE SMOKE IS
13 REASONABLE CONDUCT, YOU HAVE TO VIEW IT IN THE CONTEXT OF
14 EVERYTHING THAT WAS HAPPENING DURING THE TIME PERIODS IT WAS
15 HAPPENING.

16 IT'S SOMETHING THAT PHILIP MORRIS STARTED DOING
17 IN THE '60S. THEY HAVE CONTINUED TO DO IT. THEY'RE STILL
18 TRYING TO DO IT. AND ALL THE WAY, EVERY STEP OF THE WAY
19 THEY'VE BEEN GETTING ENCOURAGEMENT FROM PEOPLE WHO ARE
20 STUDYING THE ISSUE AND WHO HAVE DETERMINED YOU CAN'T MAKE A
21 SAFE CIGARETTE, BUT THERE MAY BE WAYS TO MAKE ONE LESS
22 HAZARDOUS.

23 YOU DIDN'T HEAR ONE WITNESS IN THE ENTIRE CASE
24 SAY THAT THERE WAS A BETTER WAY TO MAKE A LESS HAZARDOUS
25 CIGARETTE, THAT IT COULD HAVE BEEN MADE LESS HAZARDOUS
26 SOONER OR FASTER, BUT THAT THERE'S A DIFFERENT WAY TO MAKE A
27 CIGARETTE THAN THE WAY IT'S BEING MADE.

28 EVERYTHING YOU HEARD ABOUT IMPROVEMENTS IN

0115 1 CIGARETTES OVER THE YEARS WERE IMPROVEMENTS THAT WERE
2 DESIGNED AND PUT INTO PLACE BY PHILIP MORRIS. YOU HAVEN'T
3 HEARD ANY EVIDENCE THAT THE GOVERNMENT HAS A BETTER IDEA FOR
4 HOW TO MAKE A CIGARETTE OR THAT ANOTHER COMPANY IN ANOTHER
5 PART OF THIS COUNTRY OR ANY OTHER COUNTRY HAS MADE A BETTER
6 PRODUCT OR AN IMPROVED PRODUCT OR A LESS HAZARDOUS
7 CIGARETTE.

8 ALL OF THAT IS EVIDENCE YOU HAVE TO USE IN
9 DECIDING WHETHER PHILIP MORRIS' CONDUCT WAS REASONABLE AND
10 WHETHER THEY HAVE ACTED WITH FRAUD, OPPRESSION OR MALICE, AS
11 MS. CHABER SUGGESTED THIS MORNING.

12 QUITE FRANKLY, ASIDE FROM NOT SELLING CIGARETTES,
13 YOU DIDN'T HEAR ANYTHING FROM ANY WITNESS TO SUGGEST THAT
14 WHAT PHILIP MORRIS HAS DONE IN THE DESIGN AND MANUFACTURE
15 AND THE MARKETING OF CIGARETTES WAS UNREASONABLE.

16 AND BECAUSE OF THAT, WHEN YOU ANSWER THE QUESTION
17 WITH RESPECT TO NEGLIGENCE, I THINK YOUR ANSWER HAS TO BE
18 NO, THAT THE PLAINTIFF HASN'T PROVED THAT PHILIP MORRIS'
19 CONDUCT WAS UNREASONABLE, THAT THEY PERFORMED UNREASONABLY
20 IN THE DESIGN AND MANUFACTURE AND THE MARKETING OF
21 CIGARETTES.

22 AND LET ME JUST SAY ONE MORE THING ABOUT THE
23 DESIGN ISSUE BEFORE I MOVE ON INTO THE ISSUES RELATING TO
24 MS. HENLEY AND ADVERTISING. YOU HEARD ABOUT SELECTIVE
25 REDUCTION, AND THERE IS A WAY TO TAKE THINGS OUT OF SMOKE
26 SELECTIVELY. THIS WAS A DOCUMENT, DEFENDANT'S 2262. IT'S A
27 1958 MEMO FROM A MAN NAMED LINCOLN TO A MAN NAMED MILLHISER
28 AT PHILIP MORRIS.

0116 1 AND THIS IS ABOUT THE TIME THAT PEOPLE ARE
2 TALKING ABOUT THESE THINGS IN SMOKE THAT WERE IN THIS
3 PERIOD. BENZOPYRENE IS BEING DISCUSSED IN THESE LISTS OF
4 THINGS THAT PEOPLE THINK MIGHT BE CARCINOGENIC. AND IT'S
5 HARD TO READ, BUT WHAT IT SAYS IS:

6 "BASED ON EVERYTHING I HAVE REVIEWED, WHAT I
7 HAVE READ, I HAVE THE FOLLOWING CONCLUSION.
8 BENZOPYRENE MUST GO. GET IT OUT OF OUR
9 PRODUCTS. TAKE IT OUT OF CIGARETTE SMOKE."

10 AND IT MAKES SENSE. I MEAN, IF THERE IS
11 SOMETHING IN SMOKE THAT PEOPLE SAID AND WERE SAYING IS
12 SOMETHING THAT MIGHT BE A RISK TO HEALTH, TAKE IT OUT.

13 IT TURNS OUT THAT VERY SHORTLY AFTER THIS -- THIS
14 IS DEFENDANT'S EXHIBIT 2019 -- DR. WYNDER AGAIN WRITES AN

15 ARTICLE IN THE BRITISH MEDICAL JOURNAL IN 1959 WHERE HE
16 SAYS, YOU KNOW:

17 "THERE'S NOT ENOUGH BENZOPYRENE IN CIGARETTE
18 SMOKE TO ACCOUNT FOR THIS RELATIONSHIP BETWEEN
19 SMOKING AND HEALTH."

20 IT'S STILL SOMETHING THAT PEOPLE MADE EFFORTS TO
21 REMOVE. BUT IT'S INTERESTING HOW WHAT SEEMS LIKE A LOGICAL
22 OR SIMPLE IDEA MAY OR MAY NOT BE TECHNOLOGICALLY POSSIBLE.
23 AS DR. ELLIS SAID, YOU JUST CAN'T TAKE BENZOPYRENE OUT OF
24 SMOKE. IT IS SOMETHING THAT IS NOT UNIQUE TO ANY PART OF
25 TOBACCO SMOKE. THE FACT THAT IT'S IN SMOKE WAS NOT A
26 SECRET. OBVIOUSLY, WE HAVE TALKED ABOUT THAT. IT'S FOUND
27 IN FOOD, AIR AND WATER. AND AS DR. WYNDER SAID IN EXHIBIT
28 2019, THE AMOUNT IN SMOKE ISN'T ENOUGH TO ACCOUNT FOR THE

0117

1 RELATIONSHIP BETWEEN SMOKING AND HEALTH.

2 BUT BE THAT AS IT MAY, AS DR. ELLIS TOLD YOU,
3 FROM TIME TO TIME THERE WERE EFFORTS MADE AT PHILIP MORRIS
4 TO SELECTIVELY REDUCE THINGS FROM CIGARETTE SMOKE. ONE OF
5 THEM WAS BENZOPYRENE. BUT IT TURNS OUT THAT WHEN YOU FILTER
6 AND REDUCE THE TAR AND NICOTINE IN SMOKE, YOU REDUCE MOST OF
7 THE BENZOPYRENE. WHEN YOU USE THESE OTHER EXPANDED TOBACCO
8 METHODS, YOU REDUCE THE AMOUNT OF BENZOPYRENE.

9 SHE TALKED ABOUT PHENOLS. THOSE ARE THE THINGS
10 THAT SHE SAID CERTAIN FILTERS, THE FILTERS PEOPLE USE TODAY
11 SELECTIVELY REMOVE FROM SMOKE. ALKALOIDS ARE THINGS LIKE
12 THESE POLYAROMATIC HYDROCARBONS THAT WERE ON THESE LISTS WE
13 TALKED ABOUT. NITROSAMINES DR. ELLIS TALKED ABOUT, WHERE
14 THERE'S SOMETHING IN TOBACCO THAT PRODUCES A SUBSTANCE
15 CALLED NITROSAMINE THAT YOU CAN ELIMINATE IN THE SMOKE BY
16 CHANGING SOMETHING ABOUT THE TOBACCO.

17 OXIDE OF NITRATES. THE DEPOSITION MS. CHABER
18 READ FROM DR. UDESS, WHO WORKED AT PHILIP MORRIS, WAS
19 WORKING ON THAT PROJECT. THAT WAS THE ONE WHERE THEY WERE
20 TRYING TO DO SOMETHING TO THE TOBACCO TO TAKE OUT THESE
21 NITRATES WHICH PEOPLE THOUGHT MIGHT LEAD TO NITROSAMINES.
22 WHATEVER THEY WERE DOING MADE THE TOBACCO SMELL REALLY BAD.
23 THEY COULDN'T USE IT IN CIGARETTES. THAT WAS THE DEPOSITION
24 THAT WAS READ A COUPLE OF WEEKS AGO.

25 THE DEPOSITION THAT YOU HEARD ABOUT FROM DR.
26 DENOBLE WAS AN EFFORT TO CREATE A NICOTINE ANALOG. REMEMBER
27 WHAT DR. DAVIS SAID ABOUT ANALOGS, DR. BENOWITZ SAID ABOUT
28 ANALOGS. THAT WAS LIKE A SYNTHETIC NICOTINE. HE THOUGHT IT

0118

1 WAS A GOOD IDEA. HE SAID PEOPLE HAD TALKED ABOUT IT BEFORE
2 PHILIP MORRIS TRIED TO DO IT. PHILIP MORRIS DIDN'T DO IT,
3 COULDN'T DO IT. THEY PATENTED SOME THINGS, DR. ELLIS SAID,
4 ON THIS SUBJECT, AS DID DR. BENOWITZ, BUT THEY JUST COULDN'T
5 MAKE IT WORK.

6 SOME OF THE THINGS YOU HEARD ABOUT -- AND YOU
7 HEARD MUCH TODAY ABOUT THE DEPOSITIONS THAT GOT READ. SOME
8 OF THE RESEARCH THAT WAS GOING ON, AND EVEN SOME OF THESE
9 DOCUMENTS YOU MIGHT SEE THAT ARE KIND OF COMPLICATED, DEAL
10 WITH EFFORTS TO SELECTIVELY REDUCE. AGAIN, THIS IS EVIDENCE
11 OF REASONABLE CONDUCT.

12 BY GENERALLY REDUCING TAR AND NICOTINE, PHILIP
13 MORRIS DID WHAT THE SURGEON GENERAL AND OTHERS SAID COULD OR
14 SHOULD BE DONE TO REDUCE THE RISKS OF SMOKING. BUT BY DOING
15 THIS, THEY APPLIED -- REMEMBER DR. UDESS' DEPOSITION TALKING
16 ABOUT THE PEOPLE WITH THE PH.D.'S AND FACILITIES AND ALL THE
17 WORK THAT GOES ON AT PHILIP MORRIS. DR. ELLIS SAID THE SAME

18 THING.

19 THEY ARE TRYING TO DO MORE. THEY ARE TRYING TO
20 DO THINGS. THEY ARE TRYING TO APPLY TECHNOLOGY AND
21 KNOWLEDGE TO DO THINGS THAT MAY NOT HAVE MADE SENSE OR BEEN
22 POSSIBLE A FEW YEARS AGO BUT ACTUALLY MAY WORK IN THE
23 FUTURE.

24 A COUPLE OF THINGS ON THAT SUBJECT, THOUGH. IN
25 FACT, THE SURGEON GENERAL'S REPORT AGAIN -- THIS IS
26 2828-E -- DESCRIBES HOW:

27 "BENZOPYRENE CONTENT IN CIGARETTE SMOKE IS
28 SIGNIFICANTLY LOWER THAN IT WAS 30 YEARS AGO

0119

1 BECAUSE OF CHANGES IN THE COMPOSITION OF
2 RECONSTITUTED TOBACCO AND EXPANDED TOBACCO."

3 THERE'S ANOTHER DOCUMENT, WHICH IS PLAINTIFF'S
4 EXHIBIT 2-81, WHICH IS DR. WAKEHAM IN 1963 PUTTING A REPORT
5 TOGETHER THAT SUMMARIZES THINGS HE'S READING IN THE MEDICAL
6 AND SCIENTIFIC LITERATURE ON THINGS LIKE NITROSAMINES AND
7 POLYNUCLEAR HYDROCARBONS AND OTHER CHEMICALS THAT MIGHT BE
8 SELECTIVELY REDUCED FROM SMOKE, AGAIN ALL EVIDENCE OF
9 REASONABLE CONDUCT.

10 SO FINALLY, WITH RESPECT TO THE CONDUCT OF PHILIP
11 MORRIS, LET ME JUST POINT OUT A COUPLE OF THINGS THAT YOU
12 HEARD THIS MORNING AND THEN CONNECT SOME OF THE THINGS ON
13 THE VERDICT FORM.

14 ONE FINAL THING IS AGAIN, YOU HEARD DR. ELLIS
15 DESCRIBE THESE KINDS OF MEETINGS AND PEOPLE WERE
16 COMPLIMENTING PHILIP MORRIS AND OTHERS ON HOW THEY WERE
17 TRYING TO REDUCE THE RISKS OF SMOKING.

18 THIS IS THAT MEETING IN 1980. THAT IS IN
19 EVIDENCE AS 2039. THESE ARE THE KINDS OF THINGS THAT PHILIP
20 MORRIS WAS READING DURING THE TIME PERIOD THEY WERE MAKING
21 THESE CHANGES TO THEIR PRODUCTS AND TRYING TO REDUCE THESE
22 RISKS.

23 THERE WAS A DOCUMENT THAT MS. CHABER READ TO
24 YOU. IT'S PLAINTIFF EXHIBIT 76, WHERE DR. WAKEHAM WRITES TO
25 DR. HOCKETT IN 1959. AND THE THING ABOUT THESE DOCUMENTS
26 YOU'VE GOT TO BE CAREFUL WITH, I THINK, IN TERMS OF USING
27 THEM AS EVIDENCE, IF YOU ARE GOING TO READ SOMEBODY'S MIND,
28 YOU'VE GOT TO KNOW A LITTLE BIT MORE ABOUT THEM THAN WHAT

0120

1 THEY WROTE IN A PARAGRAPH IN A PIECE OF PAPER 20, 30 YEARS
2 AGO. YOU'VE GOT TO LOOK AT A CONTINUUM. YOU HAVE TO LOOK
3 AT WHAT THEY DID OVER A LONGER PERIOD OF TIME.

4 AND DR. WAKEHAM IS SOMEBODY WHOSE NAME APPEARS IN
5 SOME OF THESE DOCUMENTS, WHOSE DEPOSITION YOU HEARD READ IN
6 THE CASE, AND WHO WAS INVOLVED IN SOME OF THESE ACTIVITIES
7 FOR A LONG PERIOD OF TIME.

8 AND WHAT YOU WERE READ THIS MORNING IS A
9 STATEMENT IN ONE OF THESE DOCUMENTS WHERE DR. WAKEHAM SAYS
10 SOMETHING ABOUT THE CIGARETTE BUSINESS CONTINUING FOR QUITE
11 A LONG TIME. WELL, THE REST OF THIS DOCUMENT IS A LITTLE
12 MORE COMPLICATED THAN THAT. I MEAN, HE SPENDS A WHOLE
13 PARAGRAPH POINTING OUT IN 1959 WHAT THE EVIDENCE IS THAT
14 SUGGESTS OR ARGUES SMOKING CAUSES CANCER. AND AGAIN, HE
15 POINTS OUT THE STATISTICAL AND THE EXPERIMENTAL EVIDENCE.

16 THEN HE POINTS OUT THE FACT THAT:

17 "EPIDEMIOLOGISTS DEFINE CAUSE AS A FACTOR WHICH
18 MAY BE ASSOCIATED WITH DISEASE, EVEN IF YOU CAN'T
19 EXPLAIN WHY."

20 HE POINTS OUT THAT:

21 "CANCER RESEARCHERS GENERALLY AGREE THAT LUNG
22 CANCER IS A MULTISTAGE DISEASE THAT MAY NOT LEND
23 ITSELF TO EASY DEFINITIONS OR DESCRIPTIONS OF
24 CAUSES."
25 HE POINTS OUT THAT:
26 "MANY CANCER-PRODUCING CHEMICALS IN MOUSE
27 EXPERIMENTS ARE COMMONLY FOUND IN CITY AIR IN
28 CONCENTRATIONS HIGHER THAN CIGARETTE SMOKE."

0121
1 HE POINTS OUT THAT:
2 "THE RESEARCH INVOLVING REDUCING TAR AND
3 NICOTINE MAY BE HEADED IN THE WRONG DIRECTION,
4 BECAUSE MAYBE WHAT YOU OUGHT TO DO IS REDUCE TAR
5 BUT MAINTAIN NICOTINE."
6 THAT IS WHAT DR. ELLIS SAID THAT A DOCTOR IN
7 ENGLAND WAS SUGGESTING IN THE '70S. AND IT NEVER HAPPENED,
8 BECAUSE THERE WAS NO WAY TO DO IT. BUT AGAIN, DR. WAKEHAM
9 IS DOING THIS KIND OF THING. YOU WOULD EXPECT THE DIRECTOR
10 OF RESEARCH AT A COMPANY LIKE THIS TO BE DOING THIS AT THE
11 PARTICULAR POINT IN TIME IN WHICH HE'S DOING THEM.
12 THE OTHER DOCUMENT I WANT TO SPEND A COUPLE OF
13 MINUTES WITH YOU ON IS PLAINTIFF'S EXHIBIT 5-220. AND THIS
14 IS THE ONE WHERE MS. CHABER SHOWED YOU THAT THERE WAS A
15 LETTER FROM A DR. SELIGMAN OR MR. SELIGMAN TO A DR. SPEARS.
16 AND SHE SHOWED YOU THE BACK PAGE, WHICH THERE'S THREE THINGS
17 ON IT. IT SAYS "SUBJECTS TO BE AVOIDED."
18 AND I WILL READ THEM TO YOU. IT SAYS:
19 "SUBJECTS TO BE AVOIDED:
20 DEVELOPING NEW TESTS FOR CARCINOGENICITY.
21 ATTEMPT TO RELATE HUMAN DISEASE TO SMOKING.
22 CONDUCT EXPERIMENTS WHICH REQUIRE LARGE DOSES OF
23 CARCINOGEN TO SHOW THE ADDITIVE EFFECT OF
24 SMOKING."
25 WHAT SHE DIDN'T READ TO YOU ARE THE PAGES IN
26 BETWEEN AND WHAT THIS IS IS A LETTER FROM SELIGMAN TO DR.
27 SPEARS SAYING:
28 "HERE IS A LIST OF THINGS THAT WE THINK SHOULD

0122
1 BE STUDIED, LONG-TERM STUDIES."
2 AND ON THE FIRST PAGE, THERE ARE 17 OF THEM. AND
3 THEY INCLUDE THINGS LIKE SKIN-PAINTING EXPERIMENTS,
4 INHALATION EXPERIMENTS, INVESTIGATING INHALATION BIOASSAYS,
5 LOOKING AT THE METABOLIC FATE OF NICOTINE, INTERACTIONS OF
6 NICOTINE WITH OTHER DRUGS, NITROSAMINES. A LONG LIST OF THE
7 THINGS YOU WOULD EXPECT PEOPLE IN THIS BUSINESS AT THIS
8 POINT IN TIME, 1980, TO BE STUDYING. IT'S REASONABLE
9 CONDUCT.
10 THE SUBJECTS TO BE AVOIDED ARE THINGS THAT HAD
11 ALREADY BEEN STUDIED, STUDIED, STUDIED, AND BY OTHER PEOPLE.
12 DEVELOPING NEW TESTS FOR CARCINOGENICITY ISN'T SOMETHING
13 THAT IS GOING TO GIVE PEOPLE ANY MORE, ANY BETTER
14 INFORMATION THAN THEY ALREADY HAVE.
15 THEY HAVE THE BIOASSAYS USING CELLS. THEY HAVE
16 THE MOUSE SKIN. THEY HAVE THE INHALATION EXPERIMENTS.
17 ATTEMPTING TO RELATE HUMAN DISEASE TO SMOKING IS THE
18 EPIDEMIOLOGY. BY 1980, THAT HAD BEEN DONE. THERE HAD BEEN
19 DOZENS OF EPIDEMIOLOGIC STUDIES PUBLISHED.
20 AND "CONDUCTING EXPERIMENTS WHICH REQUIRE LARGE
21 DOSES OF CARCINOGEN TO SHOW THE ADDITIVE EFFECT OF SMOKING"
22 AGAIN GETS BACK TO WHAT DR. WYNDER AND OTHERS SAID ABOUT THE
23 ANIMAL EXPERIMENTS.

24 IT'S HARD TO KNOW WHETHER USING A LARGE AMOUNT OF
25 SOMETHING HAS ANY RELEVANCE TO SOMETHING THAT PEOPLE ARE
26 EXPOSED TO IN VERY TINY AMOUNTS. AND IT TURNS OUT TO BE
27 EXACTLY THAT.

28 BUT YOU CAN'T JUST LOOK AT THE LAST PAGE AND SAY

0123

1 THESE PEOPLE WEREN'T TRYING TO DO THE KINDS OF RESEARCH THAT
2 A REASONABLE COMPANY WOULD DO, BECAUSE THERE'S A LIST OF 17
3 THINGS ON THAT EXHIBIT THAT THEY WERE GOING TO DO.

4 SO YOU GOT AN INSTRUCTION YESTERDAY ON
5 NEGLIGENCE, AND YOU GOT INSTRUCTIONS ON WHAT REASONABLE CARE
6 IS. AND I THINK BASED ON ALL THE EVIDENCE THAT YOU'VE SEEN,
7 THAT THE EVIDENCE IN THIS CASE ESTABLISHES THAT PHILIP
8 MORRIS' CONDUCT WAS REASONABLE. IT WAS REASONABLE UNDER THE
9 CIRCUMSTANCES, GIVEN WHAT WAS KNOWN OR KNOWABLE AT THE TIME
10 ABOUT CIGARETTES, ABOUT SCIENCE, ABOUT DESIGNING THE
11 PRODUCTS. AND THE ANSWER TO THE QUESTION ON NEGLIGENCE,
12 WHICH IS SPECIAL VERDICT NO. 2, SHOULD BE NO.

13 NOW, WITH RESPECT TO FRAUD, OPPRESSION OR MALICE,
14 WHICH IS SPECIAL VERDICT NO. 10, THE EVIDENCE IN THIS CASE
15 CERTAINLY IS NOT CLEAR AND CONVINCING THAT PHILIP MORRIS
16 ACTED WITH FRAUD, OPPRESSION OR MALICE. IT'S JUST THE
17 CONTRARY. AGAIN, THE FACT THAT THEY WERE REASONABLE
18 REQUIRES TO YOU TO ANSWER THOSE QUESTIONS NO.

19 AND THEN FINALLY SPECIAL VERDICT 8 ASKS YOU ABOUT
20 A CONSPIRACY. THERE HAS BEEN NO EVIDENCE IN THIS CASE THAT
21 PHILIP MORRIS ENGAGED IN ANY CONSPIRACY TO DO ANYTHING TO
22 DEFRAUD OR MISLEAD MS. HENLEY.

23 THE ORGANIZATION THAT WAS PUT TOGETHER TO SPONSOR
24 RESEARCH DID EXACTLY WHAT PEOPLE SAID IT WAS GOING TO DO.
25 IT GAVE RESEARCHERS MONEY. THEY DID THE RESEARCH AND THEY
26 PUBLISHED IT. THERE'S NO EVIDENCE OF A CONSPIRACY. AND THE
27 ANSWER TO THAT QUESTION IN SPECIAL VERDICT 8 SHOULD ALSO BE
28 NO.

0124

1 THE LAST THING I WANT TO TALK ABOUT HAS TO DO
2 WITH THE ISSUE OF DEFECT AND FAILURE TO WARN. AND YOU SAW
3 THE INSTRUCTION EARLIER THIS MORNING ON HOW THAT'S
4 MEASURED. IT'S MEASURED BY THE EXPECTATIONS OF ORDINARY
5 CONSUMERS. THAT'S ONE PART OF THE EQUATION. I WANT TO TALK
6 ABOUT THAT.

7 JUST BECAUSE A PRODUCT HAS RISKS ASSOCIATED WITH
8 IT DOESN'T NECESSARILY MAKE IT DEFECTIVE. UNDER THE LAW, IT
9 HAS TO BE MORE DANGEROUS THAN CONTEMPLATED BY ORDINARY
10 CONSUMERS WITH KNOWLEDGE THAT'S COMMON TO THE COMMUNITY.

11 AND YOU HEARD FROM DR. PARRISH, THE UNIVERSITY OF
12 SAN DIEGO. YOU HEARD FROM SOME OTHER WITNESSES. YOU CAN GO
13 ALL THE WAY BACK TO THE 1600S AND FIND PEOPLE SAYING THINGS
14 ABOUT TOBACCO THAT ARE GETTING WIDESPREAD AND BROAD HEARING
15 AMONG COMMON, ORDINARY PEOPLE.

16 KING JAMES SAID THIS IN 1604. THIS IS
17 DEFENDANT'S EXHIBIT 2398. HE SAID:

18 "SMOKING TOBACCO IS A CUSTOM LOATHSOME TO THE
19 EYE, HATEFUL TO THE NOSE, HARMFUL TO THE BRAIN,
20 DANGEROUS TO THE LUNGS."

21 AND THAT QUOTE HAS BEEN REPEATED OVER THE YEARS,
22 UP INTO THE '60S, EVEN IN THE SURGEON GENERAL'S REPORT. AND
23 WHAT DR. PARRISH TOLD YOU IS SOMETHING LIKE THAT THAT GETS
24 REPEATED OVER A LONG PERIOD OF TIME GIVES YOU A SENSE OF HOW
25 BROADLY IT IS UNDERSTOOD OR HOW WIDELY THAT BELIEF IS SHARED
26 BY PEOPLE.

27 DEFENDANT'S EXHIBIT 2422 WAS FROM THE 1902 SEARS
28 CATALOG. AND AS DR. PARRISH TOLD YOU, THE FACT THAT PEOPLE

0125
1 WERE TRYING TO SELL CURES FOR THE TOBACCO HABIT AS EARLY AS
2 THE TURN OF THE CENTURY IS SOME INDICATION AS TO WHAT
3 CONSUMERS EXPECTED OR WHAT COMMON KNOWLEDGE WAS AS TO
4 WHETHER OR IF IT COULD BE DIFFICULT TO GIVE UP SMOKING, ONCE
5 YOU START.

6 THE FACT OF THE MATTER IS THAT ALTHOUGH SOME
7 PEOPLE QUIT SMOKING WITHOUT MUCH DIFFICULTY, OTHER PEOPLE DO
8 HAVE DIFFICULTY QUITTING. AND THAT FACT HAS BEEN A MATTER
9 OF COMMON KNOWLEDGE FOR A LONG, LONG TIME, CERTAINLY AT ALL
10 TIMES RELEVANT TO THIS LAWSUIT.

11 YOU HEARD ABOUT THE READER'S DIGEST. AND THESE
12 ARE EXHIBITS 2481, 2492, 2550 AND 2512. BACK IN THE DAYS
13 WHEN THERE WASN'T CABLE TV AND THERE WASN'T THE INTERNET,
14 MAGAZINES LIKE READER'S DIGEST WERE MUCH MORE WIDELY
15 CIRCULATED, AND THEY CAUSED PEOPLE TO TALK ABOUT THINGS IN
16 THEM. THEY ACTUALLY WERE REPRINTING THINGS FROM OTHER
17 MAGAZINES.

18 AND REMEMBER, DR. POLLAY SAID THAT THEY HAD WHAT
19 WE CALL A PASS-ALONG CIRCULATION. SOMEBODY WOULD READ IT
20 AND GIVE IT TO SOMEONE ELSE. READER'S DIGEST WAS TALKING
21 ABOUT SMOKING, USING WORDS LIKE "CANCER," USING WORDS LIKE
22 "DIFFICULTY QUITTING," TALKING ABOUT NICOTINE AND QUITTING
23 AS EARLY AS 1935, THE EARLY 1950S, 1941 AND 1950.

24 THIS IS DEFENDANT'S EXHIBIT 2746. AGAIN, IT LETS
25 YOU -- IT GIVES YOU SOME SENSE OF HOW WIDELY OR BROADLY
26 EXPECTATIONS AND COMMON KNOWLEDGE ABOUT CIGARETTE SMOKING
27 AND HEALTH HAVE BEEN OVER THIS PERIOD OF TIME.

28 DR. PARRISH ALSO TOLD YOU ABOUT SLANG TERMS AND

0126
1 HOW SLANG TERMS DEMONSTRATE COMMON KNOWLEDGE. BECAUSE
2 EVERYBODY HAS TO SHARE AN UNDERSTANDING ABOUT THE SLANG OR
3 THE JOKE EVEN TO MAKE IT SOMETHING YOU CAN SHARE AMONG
4 PEOPLE.

5 AND YOU HEARD THAT "COFFIN NAILS" WAS A WORD THAT
6 WAS USED AT THE TURN OF THE CENTURY TO DESCRIBE CIGARETTES,
7 THAT IT WAS REPEATED OVER THE YEARS AND FOUND ITS WAY INTO
8 POPULAR CULTURE IN THE '50S, CERTAINLY THROUGH LIFE
9 MAGAZINE.

10 THIS IS DEFENDANT'S 2562. AND INTERESTINGLY
11 ENOUGH, AS YOU HEARD MS. HENLEY TELL US WHEN SHE TESTIFIED,
12 SHE WAS FAMILIAR WITH THE PHRASE "COFFIN NAILS" AS IT
13 APPLIED TO CIGARETTE SMOKING. THIS IS LIFE MAGAZINE IN 1953
14 (INDICATING).

15 YOU HEARD ABOUT SONGS, THE SONG "SMOKE, SMOKE,
16 SMOKE THAT CIGARETTE," WHICH WAS A NO. 1 SONG IN THE '40S
17 AND IN THE '50S. AND IT TALKED ABOUT SMOKING IN A NEGATIVE
18 WAY. IT WAS A POPULAR SONG THAT CREATES EXPECTATIONS AND
19 SPREADS INFORMATION ABOUT SMOKING AMONG ORDINARY PEOPLE.
20 AND IN FACT, YOU REMEMBER MS. HENLEY TOLD US SHE REMEMBERED
21 HEARING THAT SONG AND KNOWING ABOUT THAT SONG.

22 CARTOONS TOO ARE SOMETHING THAT -- LIKE JOKES,
23 THEY REQUIRE COMMON UNDERSTANDING. THIS IS 1962
24 (INDICATING). AND YOU REMEMBER, DR. POLLAY TALKED ABOUT
25 PUBLIC SERVICE ANNOUNCEMENTS. AND IT WASN'T THE 1980S THAT
26 THE PUBLIC HEALTH COMMUNITY OR GOVERNMENTS STARTED RUNNING
27 PUBLIC SERVICE ANNOUNCEMENTS. DR. POLLAY TESTIFIED BACK IN
28 THE '60S THE AMERICAN CANCER SOCIETY AND OTHER PEOPLE RAN

0127

1 PUBLIC SERVICE ANNOUNCEMENTS ON TELEVISION AND ON THE RADIO
2 ENCOURAGING PEOPLE NOT TO SMOKE.

3 ONE OF THE THEMES OF THOSE CAMPAIGNS WAS KICKING
4 THE HABIT. AND THE FACT THAT YOU SEE THOSE KINDS OF THEMES
5 REPEATED IN MORE POPULAR CULTURE, POPULAR LITERATURE IS SOME
6 EVIDENCE ABOUT WHAT CONSUMERS EXPECTED OR HAD HEARD ABOUT
7 SMOKING AND HEALTH AND PERHAPS DIFFICULTY QUITTING.

8 CALIFORNIA YOU HEARD WAS UNIQUE. BECAUSE THERE
9 WERE PEOPLE IN CALIFORNIA IN THE GOVERNMENT WHO STARTED
10 PROGRAMS EVEN BEFORE THE SURGEON GENERAL'S REPORT CAME OUT
11 THAT TALKED ABOUT SMOKING AND HEALTH. THIS IS DEFENDANT'S
12 2704. AND THOSE PROGRAMS CREATE EXPECTATIONS ON THE PART OF
13 CONSUMERS ABOUT SMOKING. THIS DESCRIBES STATE SUPPORT BY
14 VOLUNTARY AGENCIES TO MAKE CALIFORNIA'S ANTI-SMOKING
15 CAMPAIGN THE LARGEST IN THE NATION. THIS IS 1963.

16 YOU HEARD DR. PARRISH SAY THAT SCHOOLS HAD
17 CURRICULUMS THAT THEY WERE DIRECTED TO TEACH USING CERTAIN
18 TEXTBOOKS THAT DEALT WITH SMOKING AND TOBACCO AND ALCOHOL
19 AND OTHER THINGS. AND ALL OF THAT CREATES EXPECTATIONS AND
20 KNOWLEDGE IN THE COMMUNITY.

21 YOU HEARD THAT -- THIS IS DEFENDANT'S 2783. YOU
22 HEARD THAT THE SURGEON GENERAL'S REPORT WHEN IT WAS
23 PUBLISHED IN 1964 WAS FRONT-PAGE NEWS. AND INDEED, I THINK
24 DR. POLLAY SAID THAT ONLY THE BEATLES COMING TO NEW YORK WAS
25 A BIGGER NEWS STORY IN 1964 THAN THE SURGEON GENERAL'S
26 REPORT.

27 AND YOU WILL RECALL MS. HENLEY TELLING US DURING
28 HER EXAMINATION SHE WAS THE KIND OF PERSON WHO WAS AWARE OF

0128

1 CURRENT EVENTS AND EVEN FRONT-PAGE NEWS WERE THE WORDS THAT
2 WERE PUT TO HER.

3 DEFENDANT'S 2722 IS AN ARTICLE FROM THE LOS
4 ANGELES TIMES THAT AGAIN DEMONSTRATES OR REFLECTS OR CREATES
5 COMMON KNOWLEDGE AND EXPECTATIONS ON THE PART OF CONSUMERS,
6 POINTING OUT THAT THE RISKS OF SMOKING WERE WIDESPREAD LONG
7 BEFORE THE SURGEON GENERAL'S REPORT WAS RELEASED.

8 ONE OF THE THINGS YOU HAVE TO DECIDE IN THIS CASE
9 WITH RESPECT TO THE ISSUE OF FAILURE TO WARN IS WHETHER A
10 WARNING WOULD HAVE TOLD PEOPLE SOMETHING THAT THEY WEREN'T
11 ALREADY AWARE OF. AND YOU HAVE TO CONSIDER THIS EVIDENCE ON
12 THAT QUESTION. IF THE RISKS ASSOCIATED WITH SMOKING WERE
13 KNOWN LONG BEFORE THE SURGEON GENERAL'S REPORT, THEN THE
14 FAILURE TO GIVE A WARNING ISN'T NECESSARILY UNREASONABLE,
15 BECAUSE PEOPLE ALREADY KNOW WHAT IT IS THAT WOULD BE IN THE
16 WARNINGS.

17 THERE'S A JURY INSTRUCTION ON THAT. YOU HEARD
18 ABOUT A LETTER TO THE EDITOR. THIS IS 2732, HOW HISTORIANS
19 WOULD USE LETTERS TO THE EDITOR TO GET A SENSE FOR WHAT
20 PEOPLE WERE THINKING ABOUT, AND HOW IT COMPARES TO ALL THE
21 OTHER INFORMATION THEY'RE RECEIVING ABOUT A SUBJECT.

22 THIS IS 1964, A LETTER TO THE EDITOR, JANUARY
23 18TH. REMEMBER, THE SURGEON GENERAL'S REPORT CAME OUT IN
24 EARLY JANUARY OF '64.

25 "IT'S TAKEN A 10-MAN PANEL OF DISTINGUISHED
26 PHYSICIANS 15 MONTHS AND TREMENDOUS SUMS OF
27 TAXPAYERS' MONEY TO DETERMINE WHAT MY GRADE-
28 SCHOOL-EDUCATED GRANDFATHER CONCLUDED 50 YEARS

0129

1 AGO. HE CALLS CIGARETTES 'COFFIN NAILS.'"
2 THAT GIVES YOU SOME SENSE OF COMMON KNOWLEDGE

3 AMONG ORDINARY PEOPLE ABOUT THE RISKS OF SMOKING AT THIS
4 POINT IN TIME, 1964.

5 1964, LOS ANGELES TIMES, PUTS IT A LITTLE MORE
6 DIRECTLY, SUGGESTING THAT THE EXPECTATIONS AND THE COMMON
7 KNOWLEDGE IS SO WIDESPREAD THAT THEY USE A SLANG TERM "WOULD
8 BE TO HAVE YOUR HEAD IN THE SAND," TO BE SURPRISED ABOUT
9 WHAT THE SURGEON GENERAL'S REPORT SAYS.

10 AND AGAIN IN DETERMINING THE ISSUE OF WARNINGS,
11 2748, WHETHER IT WAS UNREASONABLE FOR PHILIP MORRIS NOT TO
12 PROVIDE AN EARLIER WARNING. THIS IS WHAT THE AMERICAN
13 MEDICAL ASSOCIATION WAS TELLING THE FEDERAL TRADE COMMISSION
14 IN 1964:

15 "THE HEALTH HAZARDS OF EXCESSIVE SMOKING HAVE
16 BEEN WELL PUBLICIZED FOR MORE THAN 10 YEARS AND
17 ARE COMMON KNOWLEDGE. LABELING WILL NOT ALERT
18 EVEN THE YOUNG CIGARETTE SMOKER TO ANY RISKS OF
19 WHICH HE IS NOT ALREADY AWARE."

20 SO ON THE JURY INSTRUCTIONS THAT YOU HAVE BEEN
21 GIVEN, YOU HAVE TO DECIDE WHETHER MARLBORO CIGARETTES ARE
22 DEFECTIVE. AND YOU WERE INSTRUCTED THAT THEY ARE DEFECTIVE
23 "IF THEY INVOLVE DANGER THAT WOULD NOT BE
24 READILY RECOGNIZED BY THE ORDINARY USER OF THE
25 PRODUCT WITH RESPECT TO A FAILURE TO WARN. THERE
26 IS A DUTY TO PROVIDE A WARNING OF A DANGER THAT
27 WOULD NOT BE READILY RECOGNIZED BY AN ORDINARY
28 CONSUMER."

0130

1 AND THE EVIDENCE IS YOU DIDN'T SEE ANYTHING TO
2 THE CONTRARY THAT THESE RISKS WERE NOT RISKS THAT WERE KNOWN
3 TO ORDINARY CONSUMERS OR RECOGNIZED BY ORDINARY CONSUMERS.

4 THERE'S ALSO THE QUESTION OF DESIGN DEFECT. AND
5 YOU MEASURE THAT BY WHETHER A PRODUCT "FAILS TO PERFORM AS
6 SAFELY AS AN ORDINARY CONSUMER WOULD EXPECT WHEN
7 USED IN AN INTENDED OR REASONABLY FORESEEABLE
8 MANNER."

9 AND AGAIN, THAT GETS BACK TO CONSUMER
10 EXPECTATIONS AND COMMON KNOWLEDGE AND THE FACT THAT THE
11 RISKS ASSOCIATED WITH SMOKING WERE LONG MATTERS OF COMMON
12 KNOWLEDGE. SO THE ANSWER TO THOSE TWO QUESTIONS ON VERDICT
13 FORM 1, QUESTION 1 WITH RESPECT TO THE DESIGN DEFECT,
14 QUESTION 2 WITH RESPECT TO THE WARNINGS, IS NO, BECAUSE
15 CIGARETTES ARE NOT MORE DANGEROUS THAN CONTEMPLATED BY
16 ORDINARY CONSUMERS.

17 AND FINALLY, NOW LET ME TALK BRIEFLY ABOUT MS.
18 HENLEY'S TESTIMONY AND HOW IT RELATES TO THE ISSUES YOU HAVE
19 TO DECIDE IN THIS CASE. REMEMBER, MS. HENLEY ON HER DIRECT
20 EXAMINATION TOLD YOU THAT -- THESE ARE HER WORDS -- THAT SHE
21 WASN'T STUPID. AND BY THAT, SHE TOLD YOU THAT SHE DIDN'T
22 FINISH HIGH SCHOOL BUT SHE WAS STREET SMART AND SHE HAD
23 COMMON SENSE. AND SHE TOLD US ON CROSS-EXAMINATION THAT SHE
24 THOUGHT THE EDUCATION SHE GOT WAS BETTER THAN WHAT MOST
25 PEOPLE GET AT A COLLEGE TODAY.

26 BUT BE THAT ALL AS IT MAY, MS. HENLEY MADE A LOT
27 OF DECISIONS WHICH YOU COULD CALL LIFE DECISIONS VERY EARLY
28 IN HER LIFE. SHE GOT MARRIED. SHE HAD CHILDREN. SHE HAD

0131

1 TO SUPPORT HERSELF. SHE HAD TO RUN HER OWN BUSINESS. SHE
2 HAD TO SUPPORT HERSELF AND HER CHILDREN AND MAKE DECISIONS
3 FOR HERSELF AND HER CHILDREN.

4 SHE EVENING MENTIONED THE INTERESTING THING TOO
5 ABOUT COMMON KNOWLEDGE WITH RESPECT TO THE RISKS OF DRINKING

6 WHILE YOU WERE PREGNANT. SHE TALKED ABOUT THAT. SHE TALKED
7 ABOUT FRONT-PAGE NEWS.

8 YOU'LL REMEMBER SHE TOLD US ABOUT THE PHYSICIANS'
9 DESK REFERENCE, WHICH WAS THIS BOOK (INDICATING) THAT SHE
10 USED TO LOOK THINGS UP WHEN SHE WANTED INFORMATION ABOUT
11 MEDICINES AND PHARMACEUTICALS.

12 SO WITH RESPECT TO SMOKING, MS. HENLEY TOLD YOU
13 ON HER DIRECT EXAMINATION WHEN MS. CHABER ASKED QUESTIONS
14 THAT THE THINGS THAT INFLUENCED HER TO SMOKE WERE HER DESIRE
15 TO LOOK OLDER, THE FACT THAT PEOPLE IN MOVIES SMOKED, SHE
16 CONSIDERED IT TO BE A RITE OF PASSAGE, AND THAT SMOKING WAS
17 SOMETHING SHE THOUGHT, YOU KNOW, WAS GETTING AWAY WITH
18 SOMETHING SHE KNEW SHE WASN'T SUPPOSED TO. AND SHE THOUGHT
19 SHE WOULD GET AWAY WITH IT.

20 AND MS. CHABER TOLD US THIS MORNING THAT THE
21 ARGUMENT WOULD BE MADE THAT MS. HENLEY MADE A CHOICE TO
22 SMOKE. AND IT'S NOT REALLY AN ARGUMENT. IT WAS MS.
23 HENLEY'S OWN WORDS. SHE SAID THAT SHE MADE A CHOICE TO
24 SMOKE AND WENT SO FAR AS TO SAY THAT NOBODY PUT A GUN TO HER
25 HEAD. IT WAS HER CHOICE.

26 AND IF YOU LISTEN TO EVERYTHING SHE SAID AND YOU
27 THINK ABOUT WHAT SHE SAID, SHE DIDN'T SAY -- SHE DIDN'T EVEN
28 IDENTIFY A PHILIP MORRIS ADVERTISEMENT AS SOMETHING THAT SHE

0132

1 READ OR RELIED UPON WHEN SHE STARTED TO SMOKE. SHE CHOSE
2 MARLBORO BECAUSE A BOY AT SCHOOL SMOKED IT AND SHE WANTED TO
3 SMOKE HIS BRAND. WHEN SHE WAS MARRIED TO SOME OTHER PEOPLE,
4 SHE SMOKED THEIR BRANDS BECAUSE IT WAS EASIER TO SMOKE THEIR
5 BRANDS.

6 AND OF THE DIFFERENT BRANDS, SHE TOLD US THAT IT
7 WAS THE FLAVOR OF MARLBORO SHE LIKED. AND THAT EVEN A
8 CATCHY ADVERTISEMENT FOR A BRAND OF CIGARETTES SHE DIDN'T
9 LIKE COULDN'T GET HER TO SMOKE IT.

10 SO IN ALL THESE QUESTIONS IN THIS CASE THAT DEAL
11 WITH FRAUD AND DEAL WITH REPRESENTATIONS AND DEAL WITH
12 PROMISES, THERE ARE TWO WAYS YOU HAVE TO ANSWER THEM. AND I
13 HAVE GOT THE QUESTIONS. I WILL GIVE THEM TO YOU IN A
14 MINUTE. BUT ONE DEALS WITH WHETHER THERE ARE ANY STATEMENTS
15 LIKE THAT MADE TO MS. HENLEY. AND THE QUESTION -- THE
16 EVIDENCE IN THIS CASE IS THAT THERE WEREN'T.

17 MS. HENLEY DIDN'T TELL YOU THAT A MARLBORO
18 ADVERTISEMENT HAD ANYTHING TO DO WITH HER DECISION TO START
19 SMOKING. SHE DIDN'T TELL YOU THAT A MARLBORO ADVERTISEMENT
20 HAD ANYTHING TO DO WITH HER DECISION TO CHOOSE MARLBORO. IN
21 FACT, SHE TOLD US DURING HER TESTIMONY THAT SHE REALLY
22 DOESN'T REMEMBER WHETHER THOSE ADS HAD ANY PARTICULAR
23 MESSAGE AT THE TIME.

24 NOW, SHE MADE A COUPLE OF STATEMENTS THAT SHE
25 PREFACED BY SAYING: "LOOKING BACK OR IN HINDSIGHT, I THINK
26 THIS OR I THINK THAT." BUT THERE WAS NEVER A SINGLE
27 STATEMENT THAT A PHILIP MORRIS ADVERTISEMENT WAS IDENTIFIED
28 AS SOMETHING THAT MS. HENLEY READ OR REVIEWED OR RELIED UPON

0133

1 IN CHOOSING MARLBORO CIGARETTES OR DECIDING TO SMOKE.

2 AT THE TIME SHE STARTED SMOKING, MS. HENLEY WAS
3 AWARE OF THE FACT THAT THERE WERE RISKS ASSOCIATED WITH
4 SMOKING. SHE KNEW IT WAS ILLEGAL. SHE HID THE FACT THAT
5 SHE WAS SMOKING FROM HER GRANDPARENTS. SHE HAD HEARD
6 CIGARETTES REFERRED TO AS COFFIN NAILS AND CANCER STICKS.
7 SHE HAD HEARD OF SMOKERS HAVING NICOTINE FITS. SHE WAS
8 SOMEBODY WHO WAS FAMILIAR WITH FRONT-PAGE NEWS AND CURRENT

9 EVENTS.

10 SHE TOLD HER DAUGHTERS NOT TO SMOKE. HER
11 DAUGHTERS HID THE FACT THAT THEY SMOKED FROM HER WHEN THEY
12 STARTED. AND SHE EVEN SAID THAT SHE HAD HEARD ABOUT THE
13 RISKS ASSOCIATED WITH SMOKING. AND SHE SAID THAT EITHER SHE
14 DIDN'T PAY ATTENTION TO THEM OR SHE DIDN'T WANT TO BELIEVE
15 THEM OR THAT SOMEHOW SHE JUST DIDN'T -- SHE WANTED TO SMOKE
16 MORE THAN SHE WANTED TO QUIT.

17 THERE WERE CERTAINLY WARNING LABELS ON CIGARETTE
18 PACKAGES SHORTLY AFTER MS. HENLEY STARTED TO SMOKE. THIS
19 WAS THE LABEL IN '69, THIS WAS THE LABEL IN '70, THIS WAS
20 THE LABEL IN '85 (INDICATING). AND MS. HENLEY TESTIFIED
21 THAT THOSE WARNING LABELS HAD NO EFFECT ON HER DECISION TO
22 SMOKE.

23 ONE OF THE THINGS YOU HAVE TO ANSWER IS WHETHER
24 THE FAILURE TO GIVE AN EARLIER WARNING CAUSED ANY DAMAGE TO
25 MS. HENLEY. WELL, IF THESE WARNINGS DIDN'T AFFECT HER
26 DECISION TO SMOKE IN ANY WAY, IT'S HARD TO UNDERSTAND HOW
27 THE PLAINTIFF HAS PROVEN TO YOU THAT AN EARLIER WARNING
28 WOULD HAVE CHANGED HER BEHAVIOR IN ANY WAY.

0134

1 WE HEARD A LITTLE BIT IN THE CASE ABOUT
2 ADDICTION. DR. BENOWITZ TESTIFIED ABOUT IT. INTERESTINGLY
3 ENOUGH, DR. ELLIS, WHO IS PHARMACOLOGIST, DIRECTOR OF
4 RESEARCH AT PHILIP MORRIS, WAS HERE FOR A DAY AND A HALF AND
5 WASN'T ASKED A SINGLE QUESTION ABOUT ADDICTION ON
6 CROSS-EXAMINATION.

7 BUT CIGARETTE SMOKING AND NICOTINE ARE SOMETHING
8 THAT PEOPLE HAVE STUDIED FOR A LONG PERIOD OF TIME. YOU
9 HEARD DR. BENOWITZ TELL YOU THAT NICOTINE OCCURS IN TOBACCO,
10 AND IT'S BEEN KNOWN FOR A LONG, LONG TIME. IT'S ONE OF THE
11 MOST STUDIED SUBSTANCES IN HISTORY. THE FACT THAT THERE IS
12 NICOTINE IN CIGARETTE SMOKE IS SOMETHING THAT PEOPLE HAVE
13 KNOWN ABOUT AND STUDIED FOR A LONG TIME.

14 PEOPLE HAVE CALLED CIGARETTE SMOKING A HABIT,
15 THEY HAVE CALLED IT AN ADDICTION, THEY HAVE CALLED IT A
16 DEPENDENCY. THERE ARE A VARIETY OF THINGS IT'S BEEN CALLED
17 OVER THE YEARS, BUT THE SURGEON GENERAL IN 1964 DECIDED TO
18 CALL IT A HABIT.

19 AND IF YOU LOOK AT THIS EXHIBIT -- IT'S 2828-A --
20 THEY POINT OUT THAT:

21 "THE RIGHT WAY TO DEFINE CIGARETTE SMOKING IS A
22 HABIT, NOT AN ADDICTION, BUT THAT DOESN'T MEAN
23 IT'S EASY TO QUIT."

24 IN 1988, THE SURGEON GENERAL USED A DIFFERENT
25 DEFINITION. THERE IS A COPY OF THE SURGEON GENERAL'S REPORT
26 ON THE END OF THAT TABLE WHERE THEY DESCRIBE NICOTINE AS AN
27 ADDICTION IN 1988, BUT THEY USED A DIFFERENT DEFINITION.

28 EVERY WITNESS WHO TESTIFIED -- DR. DAVIS, DR.

0135

1 BENOWITZ -- AGREED THAT WHETHER SOMETHING IS ADDICTIVE OR
2 NOT DEPENDS ON HOW YOU DEFINE ADDICTION. AND IT REALLY
3 DOESN'T MATTER HOW YOU DEFINE CIGARETTE SMOKING. BECAUSE
4 THE ISSUE IN THIS LAWSUIT IS WHAT EFFECT DID SMOKING HAVE ON
5 MS. HENLEY'S BEHAVIOR OR HER DECISIONS TO SMOKE.

6 AND YOU HEARD SOME TESTIMONY IN THE CASE ABOUT
7 CIGARETTE SMOKING AND ABOUT QUITTING. AND THE CENTER FOR
8 DISEASE CONTROL AND THE SURGEON GENERAL HAVE PUT TOGETHER
9 REPORTS ON THIS.

10 "AT THIS POINT IN TIME, ALMOST 50 MILLION PEOPLE
11 HAVE QUIT. HALF OF EVERYBODY WHO EVER SMOKED IS

12 NOW A FORMER SMOKER. MOST OF THEM HAVE DONE SO
13 WITHOUT FORMAL TREATMENT PROGRAMS."
14 AND BY QUITTING SMOKING, THE DOCTORS ALL
15 TESTIFIED YOU REDUCE YOUR RISK. NOW, THERE WAS SOME DEBATE
16 ABOUT THAT. BUT REMEMBER, DR. BENOWITZ TESTIFIED THAT HE
17 TELLS HIS PATIENTS TO QUIT SMOKING FOR TWO REASONS. ONE,
18 BECAUSE THEY CAN. WHETHER YOU CALL SMOKING A HABIT OR
19 WHETHER YOU CALL IT AN ADDITION DOESN'T MEAN THAT IT'S
20 IMPOSSIBLE FOR PEOPLE TO QUIT.

21 MOST OF THESE PEOPLE (INDICATING), AS DR. DAVIS
22 AND DR. BENOWITZ TOLD YOU, DIDN'T QUIT THE FIRST TIME. IT
23 TOOK THEM MORE THAN ONE TRY. BUT 50 MILLION OF THEM QUIT,
24 90 PERCENT WITHOUT TREATMENT PROGRAMS.

25 BUT THE SECOND REASON DOCTORS TELL THEIR PATIENTS
26 TO QUIT IS BY DOING SO, YOU REDUCE YOUR RISKS OF DEVELOPING
27 DISEASES ASSOCIATED WITH SMOKING. THIS IS 2828-F. IT'S THE
28 1982 SURGEON GENERAL'S REPORT AND IT POINTS OUT THAT:

0136
1 "QUITTING SMOKING REDUCES ONE'S CANCER RISK
2 SUBSTANTIALLY. 15 YEARS AFTER QUITTING, THE
3 FORMER SMOKER'S LUNG CANCER RISK IS REDUCED CLOSE
4 TO THAT OBSERVED IN NONSMOKERS."

5 SO THERE'S A REASON DOCTORS GIVE THAT ADVICE TO
6 PATIENTS, AND IT'S IN PART BECAUSE PEOPLE CAN QUIT. NOW,
7 MS. HENLEY DID QUIT. AND SHE TESTIFIED ABOUT THAT IN SOME
8 DETAIL. SHE TESTIFIED THAT SHE NEVER REALLY WANTED TO GIVE
9 UP SMOKING UNTIL SHE DID QUIT.

10 THERE WAS A POINT IN TIME WHERE SHE QUIT FOR
11 ABOUT THREE WEEKS AFTER SHE HAD A COLD. AND REMEMBER, SHE
12 TESTIFIED SHE STARTED AGAIN BECAUSE SHE RAN INTO SOME
13 FRIENDS WHO SMOKED. SHE GAINED A LITTLE WEIGHT AND WANTED
14 TO FIT INTO A CERTAIN DRESS. AND THAT THE COST WASN'T A
15 FACTOR FOR HER, THE PRICE OF CIGARETTES. SO SHE STARTED
16 SMOKING AGAIN.

17 DR. BENOWITZ TOLD YOU THAT NOBODY HAS NICOTINE IN
18 THEIR BODY THREE WEEKS AFTER THEY QUIT SMOKING, AND THAT
19 NICOTINE DOESN'T PREVENT YOU FROM READING AND UNDERSTANDING
20 WARNINGS OR MAKING A DECISION TO SMOKE. BUT MS. HENLEY
21 TESTIFIED THAT SHE NEVER MADE A DEDICATED EFFORT TO QUIT
22 UNTIL SHE DID QUIT, AND SHE AT THAT POINT HAD DECIDED THAT
23 SINGING WAS MORE IMPORTANT THAN SMOKING.

24 SHE MADE A DECISION TO QUIT AND SAID: "THAT'S
25 IT. I'M NOT GOING TO SMOKE ANYMORE." YOU REMEMBER FROM THE
26 VIDEOTAPE WE SAW FRIDAY FROM HER TESTIMONY, SHE TOLD US THAT
27 SHE TOLD PEOPLE SHE WAS QUITTING OCTOBER 1ST, 1997. SHE
28 PSYCHED HERSELF UP -- HER WORDS -- REALLY WENT THE WHOLE

0137
1 ROUTE, THREW AWAY ASHTRAYS, LOOKED AT HER LAST CIGARETTE AND
2 SAID: "I'M NOT GOING TO SMOKE." AND SHE STOPPED COLD
3 TURKEY.

4 LET ME SAY A COUPLE OF OTHER THINGS ABOUT MS.
5 HENLEY AND SMOKING. SHE TESTIFIED THAT SHE ENJOYED
6 SMOKING. AND YOU HEARD DR. BENOWITZ TELL YOU THAT THERE ARE
7 PEOPLE WHO ENJOY SMOKING. SHE TESTIFIED THAT IT RELAXED
8 HER, IT GAVE HER SOMETHING TO DO WITH HER HANDS, IT KEPT HER
9 FROM EATING CANDY BARS, AT TIMES IT HELPED HER CONCENTRATE,
10 BE PRODUCTIVE, AND IT WAS SOMETHING SHE ASSOCIATED WITH
11 COFFEE AND ALCOHOL.

12 SO THERE ARE A LOT OF REASONS PEOPLE SMOKE AND
13 FOR EVERYBODY THERE ARE DIFFERENT REASONS. AND MS. HENLEY
14 TOLD US ABOUT HER REASONS. SHE ALSO TOLD US THAT THERE CAME

15 A POINT IN TIME THAT SHE WANTED TO QUIT AND SHE DID QUIT.
16 AND WHETHER YOU CALL SMOKING A HABIT OR AN ADDICTION OR A
17 DEPENDENCE REALLY DOESN'T MATTER. WHETHER YOU DESCRIBE MS.
18 HENLEY AS BEING ADDICTED TO CIGARETTES REALLY DOESN'T
19 MATTER. THE QUESTION IS WHAT EFFECT DID IT HAVE ON HER
20 ABILITY TO MAKE CHOICES? AND SHE TOLD US ABOUT THOSE
21 CHOICES.

22 SHE TOLD US THAT SHE MADE A CHOICE TO START
23 SMOKING. REMEMBER HER TELLING US IN CROSS-EXAMINATION AND
24 DURING THE VIDEOTAPE THAT WE SHOWED FRIDAY. REMEMBER, SHE
25 TOLD US THAT SHE CONTINUED TO SMOKE, ENJOYED SMOKING. AND
26 THERE CAME A POINT IN TIME WHERE SHE DETERMINED THAT SHE WAS
27 GOING TO QUIT SMOKING. WHAT SHE SAID WHEN SHE TESTIFIED AND
28 WHAT YOU SAW IN THE VIDEOTAPE FROM HER DEPOSITION WAS THAT

0138
1 IT WAS HER DECISION TO SMOKE, AND THAT SHE BELIEVED THAT SHE
2 WAS RESPONSIBLE FOR THAT DECISION.

3 AND YOU HEARD A LOT IN THIS CASE ABOUT
4 ADVERTISING. TO TELL YOU THE TRUTH, YOU HEARD TWO DAYS OF
5 TESTIMONY FROM DR. POLLAY. YOU HEARD FROM JIM MORGAN, WHO
6 DID A LOT OF THINGS AT PHILIP MORRIS. AND MS. CHABER SAID
7 THIS MORNING "YOU SHOULD ASK YOURSELF WHY PHILIP MORRIS
8 STUDIED CHILDREN IF THEY WEREN'T SELLING CIGARETTES TO
9 CHILDREN?"

10 AND THE QUESTION WAS BETTER DIRECTED TO MR.
11 MORGAN, BECAUSE HE WAS THE MAN WHO WAS THERE AND HE WAS
12 ASKED THAT QUESTION. AND WHAT HE TOLD YOU IS EXACTLY WHAT
13 THE EVIDENCE IN THIS CASE HAS SHOWN, THAT PHILIP MORRIS
14 DIDN'T STUDY CHILDREN.

15 THERE'S ONE PIECE OF PAPER IN ALL THESE NOTEBOOKS
16 WHERE A MAN NAMED MYRON JOHNSTON, WHO WAS A DEMOGRAPHER, WHO
17 DIDN'T EVEN WORK WITH MR. MORGAN, WHO WAS IN CHARGE OF
18 ADVERTISING, COLLECTED INFORMATION THAT OTHER PEOPLE HAD
19 GATHERED ABOUT SMOKING RATES AMONG CERTAIN AGES. AND MR.
20 MORGAN SAID THAT THEY DIDN'T USE THAT INFORMATION, THAT IT
21 WASN'T THEIR PRACTICE TO COLLECT THAT KIND OF INFORMATION
22 AND THAT IT WAS AN ISOLATED INCIDENT.

23 BUT MORE IMPORTANTLY, WHAT MR. MORGAN SAID IS
24 THAT IN ALL THE YEARS HE WAS AT PHILIP MORRIS, NO ONE EVER
25 MADE A PLAN TO TARGET CHILDREN. NO ONE EVER TRIED TO SELL
26 CIGARETTES TO CHILDREN, THAT THERE WERE ENOUGH WAYS TO TRY
27 TO SELL CIGARETTES TO ADULTS WHO WANTED TO SMOKE THEM, THAT
28 THERE WASN'T REALLY THE NEED OR THE IDEAS THAT MS. CHABER

0139
1 WANTS YOU TO BELIEVE THOSE PEOPLE HAD ABOUT SMOKING AND
2 CHILDREN.

3 HE ADMITTED THERE ARE PEOPLE, UNDERAGE TEENAGERS
4 WHO SMOKE CIGARETTES. HE TOLD YOU THAT THERE ARE LAWS THAT
5 ARE IN PLACE TO PREVENT THAT, THAT RETAILERS ARE SUPPOSED TO
6 NOT DO THAT. AND HE ALSO ADMITTED THERE IS NO WAY TO
7 ADVERTISE A PRODUCT LIKE CIGARETTES WITHOUT DOING IT IN WAYS
8 THAT PEOPLE WHO AREN'T OF LEGAL AGE MIGHT SEE THOSE ADS.
9 BUT ALL OF THAT IS DONE IN THE CONTEXT OF A PRODUCT THAT IS
10 THE MOST SCRUTINIZED, MOST CRITICIZED AND MOST LOOKED AT
11 PRODUCT THAT ANYONE I THINK COULD IMAGINE.

12 AND IF THERE WAS -- IF THERE WAS A BIG PILE FULL
13 OF PLANS TO SELL CIGARETTES TO CHILDREN, YOU WOULD HAVE SEEN
14 THEM. IF THERE WAS A WITNESS WHO COULD HAVE COME IN HERE
15 AND TOLD YOU THAT PHILIP MORRIS HAD A PLAN TO TRY TO SELL
16 CIGARETTES TO CHILDREN, YOU WOULD HAVE SEEN IT. JIM MORGAN
17 WAS THERE. HE SAYS IT DIDN'T HAPPEN. AND NONE OF THE

18 EVIDENCE IN THIS CASE IS EVIDENCE TO THE CONTRARY, EVEN
19 THOUGH THE FACT IS THAT PEOPLE WHO AREN'T OLD ENOUGH TO
20 SMOKE SMOKE.

21 THERE WAS A REFERENCE TO ANOTHER ONE OF MR.
22 MORGAN'S DOCUMENTS, 5-226. INTERESTING, TOO. THERE ARE A
23 LOT OF DOCUMENTS IN EVIDENCE WITH MR. MORGAN'S NAME ON
24 THEM. HE WASN'T ASKED ABOUT ANY OF THEM DURING HIS
25 CROSS-EXAMINATION.

26 THERE WAS AN EXHIBIT NO. 81, PLAINTIFF'S 81 WHERE
27 MS. CHABER ASKED DR. PARRISH YESTERDAY IF CULLMAN, JOE
28 CULLMAN FROM PHILIP MORRIS ISN'T QUOTED AS TALKING ABOUT

0140

1 YOUNGSTERS SMOKING. IT'S NOT WHAT IT SAYS. IT SAYS:
2 "CULLMAN BASED HIS OPTIMISM ON THE PROJECTED
3 SHARP INCREASE IN THE 20-TO-24 AGE GROUP."
4 IT DOESN'T SAY ANYTHING IN HERE ABOUT CHILDREN
5 SMOKING, ABOUT PHILIP MORRIS WANTING CHILDREN TO SMOKE.

6 THE ADVERTISING ISSUE IS CONNECTED TO ALL THESE
7 FRAUD CLAIMS. SPECIAL VERDICT NO. 3, NO. 4, NO. 5, NO. 6
8 AND NO. 7 ALL ASK YOU QUESTIONS ABOUT WHETHER STATEMENTS
9 WERE MADE OR PROMISES WERE MADE OR STATEMENTS OF FACT WERE
10 MADE TO MS. HENLEY, AND THE ANSWER TO THOSE QUESTIONS IS
11 NO. MS. HENLEY DIDN'T IDENTIFY A SINGLE SUCH STATEMENT.

12 AND THEN THE NEXT QUESTION THAT YOU ARE ASKED IN
13 CONNECTION WITH ALL OF THAT IS: "DID ANYTHING THAT PHILIP
14 MORRIS SAID TO MS. HENLEY CAUSE HER TO RELY ON IT OR TO ACT
15 ON IT?" AND THE ANSWER TO THOSE QUESTIONS IS NO. SHE
16 DIDN'T TESTIFY AS TO ANYTHING SHE DID IN RELIANCE ON OR IN
17 CONNECTION WITH SOMETHING PHILIP MORRIS TOLD HER OR DIDN'T
18 TELL HER.

19 AND AGAIN, WHEN YOU GET TO THE QUESTIONS ON
20 CAUSE, THERE ARE A LOT OF DIFFERENT REASONS WHY PLAINTIFF
21 HASN'T PROVED THAT THE CONDUCT OF PHILIP MORRIS OR THE
22 PRODUCT OF PHILIP MORRIS OR THE STATEMENTS OF PHILIP MORRIS
23 CAUSED INJURY TO PATRICIA HENLEY. AND THAT'S THE ISSUE.
24 WHEN YOU ANSWER THOSE CAUSE QUESTIONS, YOU'VE GOT TO ASK
25 YOURSELF: "HAS THE PLAINTIFF PROVED THAT SHE HAS CANCER
26 THAT STARTED IN HER LUNG?"

27 REMEMBER, THE EVIDENCE IN THIS CASE IS THAT IF IT
28 IS A THYMIC CANCER, THAT DOESN'T HAVE ANY ASSOCIATION WITH

0141

1 CIGARETTE SMOKING, AND THAT SMALL CELL CARCINOMA STARTS IN
2 OTHER PARTS OF THE BODY WITHOUT BEING CONNECTED TO CIGARETTE
3 SMOKING.

4 SO THE NEXT QUESTION IS: "HAS THE PLAINTIFF
5 PROVED THAT SHE HAS ANY KIND OF CANCER THAT WAS CAUSED BY
6 CIGARETTE SMOKING?" AND THE ANSWER TO THAT IS CLEARLY NO.

7 THEN YOU HAVE TO ASK YOURSELF QUESTIONS ABOUT
8 THESE FRAUD COUNTS, AND THEY ALL DEAL WITH CAUSE. IF MS.
9 HENLEY DIDN'T READ OR RELY ON THESE STATEMENTS, HOW COULD
10 THEY HAVE CAUSED ANY DAMAGE TO HER? SO THERE ARE A LOT OF
11 DIFFERENT WAYS TO DETERMINE THE PLAINTIFF HASN'T PROVED TO
12 YOU AND THAT THE EVIDENCE IS INSUFFICIENT TO PROVE THAT THE
13 CONDUCT OF PHILIP MORRIS OR THE STATEMENTS OF PHILIP MORRIS
14 OR THE PRODUCTS OF PHILIP MORRIS CAUSED INJURY TO MS.
15 HENLEY.

16 AND LET ME JUST SUMMARIZE AND CONCLUDE BY
17 POINTING OUT A COUPLE OF THINGS CONNECTED WITH ONE PIECE OF
18 EVIDENCE. MS. HENLEY TESTIFIED ABOUT WHY SHE STARTED
19 SMOKING, WHEN SHE SMOKED, WHAT SHE ENJOYED ABOUT SMOKING,
20 AND THE FACT THAT SHE DID QUIT SMOKING AND THEN DEVELOPED A

21 DISEASE THAT SHE CLAIMS IS ASSOCIATED WITH HER SMOKING. AND
22 SHE EVEN TESTIFIED TO BEING ANGRY AFTER SHE WAS DIAGNOSED
23 WITH CANCER.

24 AND THAT'S UNDERSTANDABLE. I THINK ANYBODY WHO
25 HAS HAD FRIENDS OR FAMILY MEMBERS WHO HAVE BEEN DIAGNOSED
26 WITH CANCER CAN SYMPATHIZE OR UNDERSTAND THE RANGE OF
27 FEELINGS PEOPLE MIGHT HAVE WITH SOMETHING LIKE THAT. AND
28 SHE HAS THE RIGHT TO BRING A LAWSUIT LIKE THIS. BUT ONCE WE

0142
1 GET HERE, ONCE WE GET TO COURT, THERE'S AN OBLIGATION AND A
2 BURDEN TO PROVE THOSE CLAIMS. AND WE MAKE CHOICES IN OUR
3 LIVES, AND SOME OF US MAKES CHOICES THAT OTHERS OF US
4 DISAGREE WITH. SOME PEOPLE DO THINGS AND OTHER PEOPLE
5 DISAGREE WITH THE CHOICES OTHER PEOPLE MAKE. AND THOSE ARE
6 THE KINDS OF CHOICES SOMETIMES THAT PRODUCE CONSEQUENCES OR
7 HAVE CONSEQUENCES.

8 AND YOU HAVE GOT TO START AND YOU ALMOST HAVE TO
9 FINISH RIGHT WHERE YOU STARTED WITH DR. DAVIS. REMEMBER,
10 DR. DAVIS TESTIFIED THAT HE WAS INVOLVED IN HELPING PEOPLE
11 OR GIVING PEOPLE INFORMATION THAT THEY CAN TAKE TO REDUCE
12 RISK IN THEIR LIFE. HE TALKED ABOUT BICYCLE HELMETS, DIET,
13 EXERCISE, SMOKING, BLOOD PRESSURE, SLEEPING, ALL THE KINDS
14 OF THINGS THAT REDUCE PEOPLE'S RISKS.

15 AND PHILIP MORRIS NO DOUBT SELLS CIGARETTES. AND
16 THERE'S NO DOUBT THERE ARE RISKS ASSOCIATED WITH SMOKING.
17 THERE'S ALSO NO DOUBT THAT SINCE 1966, THERE HAS BEEN A
18 WARNING ON CIGARETTES PACKAGES THAT'S CHANGED OVER TIME.
19 BUT IN BETWEEN, IN BETWEEN DR. DAVIS AND IN BETWEEN PHILIP
20 MORRIS, YOU HAVE PEOPLE MAKING CHOICES.

21 AND DEFENDANT'S EXHIBIT 2828 IS AGAIN THE 1979 --
22 2828-D IS THE 1979 SURGEON GENERAL'S REPORT. AND THERE IS A
23 STATEMENT NEAR THE END OF IT. AFTER THE SURGEON GENERAL
24 GOES ON TO TALK ABOUT THE TAR AND NICOTINE LEVELS IN
25 CIGARETTE SMOKE, THE FACT THAT REDUCING THEM MIGHT REDUCE
26 RISKS, HE TALKS ABOUT ADVERTISING, HE TALKS ABOUT THE 1964
27 SURGEON GENERAL'S REPORT, HE TALKS ABOUT ADDICTION,
28 DESCRIBES NICOTINE AS AN ADDICTIVE DRUG. YET AT THE

0143
1 BEGINNING OF THE FINAL PARAGRAPH, HE SAYS:
2 "THE DECISION TO SMOKE IS A PERSONAL
3 DECISION. BUT ONCE THIS IS SAID, IT REMAINS
4 UNQUESTIONABLY THE RESPONSIBILITY OF HEALTH
5 OFFICIALS TO INSURE THAT SMOKERS AND POTENTIAL
6 SMOKERS ARE ADEQUATELY INFORMED OF THE HAZARDS."
7 REMEMBER, DR. DAVIS TALKED ABOUT THAT AND HE
8 QUIBBLED. WE DISCUSSED INFORMED CHOICE. BUT THE FACT OF
9 THE MATTER IS THAT CHOICES AND INFORMED CHOICES THAT PEOPLE
10 MAKE THAT HAVE CONSEQUENCES ARE THE SUBSTANTIAL FACTOR THAT
11 BRING ABOUT THOSE CONSEQUENCES. THE CHOICES THAT PEOPLE
12 MAKE THAT HAVE CONSEQUENCES ARE THE SUBSTANTIAL FACTOR THAT
13 BRINGS THOSE CONSEQUENCES ABOUT.

14 THE FACT THAT PHILIP MORRIS SOLD CIGARETTES, THE
15 FACT THAT PHILIP MORRIS MAY OR MAY NOT HAVE SAID CERTAIN
16 THINGS ABOUT THEIR CIGARETTES, AND THE FACT THAT THERE MAY
17 OR MAY NOT BE WAYS TO MAKE A SAFE CIGARETTE ARE NOT THE
18 SUBSTANTIAL FACTOR THAT BROUGHT ABOUT ANY OF THE
19 CONSEQUENCES OF MS. HENLEY'S CHOICES.

20 AND I APPRECIATE YOUR ATTENTION. I APPRECIATE
21 YOUR PATIENCE. ON BEHALF OF PHILIP MORRIS, I THANK YOU AND
22 WOULD ASK YOU TO RETURN A VERDICT IN THIS CASE FOR PHILIP
23 MORRIS BY ANSWERING THE SPECIAL VERDICT QUESTIONS THAT WE

24 DISCUSSED AND THAT YOU'LL REVIEW AND DISCUSS IN THE JURY
25 ROOM IN A WAY THAT IS CONSISTENT AND COMPELLED BY THE
26 EVIDENCE.

27 THERE JUST ISN'T ENOUGH EVIDENCE IN THIS CASE TO
28 PROVE THAT MS. HENLEY HAD CANCER THAT STARTED IN HER LUNG.

0144

1 THERE ISN'T ENOUGH EVIDENCE TO PROVE THAT PHILIP MORRIS WAS
2 UNREASONABLE. IN FACT, THE EVIDENCE IS TO THE CONTRARY.
3 AND THERE IS NO EVIDENCE THAT PHILIP MORRIS MADE ANY
4 STATEMENTS THAT WERE RELIED UPON OR ACTED UPON BY MS.
5 HENLEY. AND THERE CERTAINLY IS NOT EVIDENCE THAT IS CLEAR
6 AND CONVINCING THAT PHILIP MORRIS ACTED WITH FRAUD,
7 OPPRESSION OR MALICE. THE EVIDENCE IN THIS CASE IS TO THE
8 CONTRARY. THANK YOU.

9 THE COURT: JURORS, I'M GOING TO GIVE YOU
10 ANOTHER 15-MINUTE RECESS BEFORE MS. CHABER MAKES THE FINAL
11 CLOSING ARGUMENT. WE'LL RESUME AT 4:25.

12 AND PLEASE CONTINUE TO FOLLOW THE ADMONITION
13 DURING THE RECESS. WE'LL SEE YOU BACK AT 4:25.

14 (RECESS TAKEN FROM 4:10 TO 4:25 P.M.)

15 THE COURT: WE'RE BACK ON THE RECORD. MS.
16 CHABER, YOU MAY PROCEED.

17 MS. CHABER: THANK YOU, YOUR HONOR.

18 THE GOOD NEWS IS THIS WILL BE SHORT. THE JUDGE
19 PROMISED YOU YOU WOULD BE OUT OF HERE BY 5:00, AND I'M GOING
20 TO TRY TO DO IT EVEN SOONER THAN THAT.

21 WHICH WAY IS IT? DID EVERYBODY KNOW? EVERYBODY
22 EXCEPT FOR PHILIP MORRIS, APPARENTLY. APPARENTLY EVERYONE
23 IN THE WORLD READS KING JAMES I. IT'S SO FAMOUS. GO HOME.
24 ASK YOUR FRIENDS. ASK YOUR NEIGHBORS. HOW MANY HAVE READ
25 THAT? ASK ABOUT THAT.

26 PATRICIA IS SUPPOSED TO KNOW ALL OF THE HAZARDS,
27 ALL OF THE DANGERS, HOW MANY PEOPLE ARE KILLED, DIE EVERY
28 YEAR FROM SMOKING. BUT THEY DON'T KNOW. THEY DON'T KNOW

0145

1 THAT AT ALL.

2 MR. OHLEMAYER SAID THAT I WAS TAKING THINGS OUT
3 OF CONTEXT, THAT HOW COULD I TAKE WORDS, WORDS THAT HAD BEEN
4 SAID YEARS AGO, AND TRY TO READ PEOPLE'S MINDS? WELL, YOU
5 KNOW, THE INTERESTING THING ABOUT WORDS IS THEY'RE COMMITTED
6 TO PAPER. THEY'RE THERE IN WRITING. THEY CANNOT BE
7 ERASED. THEY CANNOT BE GIVEN SPIN FROM THE WITNESS BOX.

8 AND THAT IS WHAT THE WITNESSES THAT YOU HEARD,
9 MR. MORGAN AND MR. -- AND DR. ELLIS -- EXCUSE ME -- WERE
10 BEST AT, SPIN. RECALL, DR. ELLIS NEVER ANSWERED A QUESTION
11 THAT I ASKED. SHE ANSWERED WHATEVER QUESTION SHE WANTED TO
12 ANSWER.

13 AND MR. MORGAN, AS YOU WILL RECALL, HE WAS
14 MORTIFIED THAT THERE WAS THIS ONE DOCUMENT. HE WAS
15 EMBARRASSED ABOUT THIS YOUTH DOCUMENT. ONE PERSON. NOTHING
16 ELSE, EVER. ALL WE NEED TO DO IS LOOK.

17 WELL, THERE'S GOOD REASON WHY MR. MORGAN WAS
18 EMBARRASSED ABOUT THE ONE DOCUMENT HE'S REFERRING TO.
19 THAT'S BECAUSE HE'S CC'D ON IT. MR. MORGAN, WHO DIDN'T SEEM
20 TO KNOW ANYTHING ABOUT IT OTHER THAN NOW IT HAS SHOWED UP TO
21 EMBARRASS THEM.

22 PHILIP MORRIS HAS BEEN LOOKING AT CHILDREN AND
23 LOOKING AT THEM FOR A LONG TIME. AND THE REASON THAT THEY
24 DO THAT IS VERY SIMPLE. CHILDREN START SMOKING. CHILDREN
25 SMOKE MARLBOROS. 15-YEAR-OLDS DON'T MAKE INFORMED CHOICES.

26 THIS IS PLAINTIFF'S EXHIBIT 4-183. AND BEFORE

27 I SHOW YOU THE FRONT OF IT, I JUST WANT TO SHOW YOU --
28 MAYBE WE CAN GET THE LIGHTS. THANK YOU. IT'S CC'D TO MR.

0146

1 J. MORGAN. AND I'LL TELL YOU, LADIES AND GENTLEMEN, IF YOU
2 THINK I TOOK THINGS OUT OF CONTEXT. I PUT IN OVER 1,000
3 DOCUMENTS, PHILIP MORRIS DOCUMENTS, DOCUMENTS FROM THE TIRC,
4 DOCUMENTS FROM THE TOBACCO INSTITUTE, SO NOBODY WOULD ACCUSE
5 ME OF TAKING THINGS OUT OF CONTEXT.

6 AND THIS ISN'T JUST DEMOGRAPHICS. FIRST OF ALL,
7 IT SAYS "DEMOGRAPHICS," BUT LOOK AT WHAT IT SAYS. IT SAYS:
8 "IT HAS BEEN WELL ESTABLISHED BY THE NATIONAL
9 TRACKING STUDY AND OTHER STUDIES THAT MARLBORO
10 HAS FOR MANY YEARS HAD ITS HIGHEST MARKET
11 PENETRATION AMONG YOUNGER SMOKERS."

12 NOW THEY'RE TALKING ABOUT STUDIES THAT WERE DONE
13 OUTSIDE PHILIP MORRIS.

14 "MOST OF THOSE STUDIES" -- THE OUTSIDE
15 STUDIES -- "HAVE BEEN RESTRICTED TO PEOPLE AGE
16 ARE 18 AND OVER."
17 FOR GOOD REASON, BECAUSE CHILDREN AREN'T SUPPOSED
18 TO SMOKE. "WE'RE NOT SUPPOSED TO APPEAL TO THEM."
19 "BUT BY MY OWN DATA, WHICH INCLUDES YOUNGER
20 TEENAGERS, SHOWS EVEN HIGHER MARLBORO
21 PENETRATION AMONG 15-TO-17 YEAR-OLDS. THE
22 TEENAGE YEARS ARE ALSO IMPORTANT BECAUSE THOSE
23 ARE THE YEARS DURING WHICH MOST SMOKERS BEGIN TO
24 SMOKE, THE YEARS IN WHICH INITIAL BRAND
25 SELECTIONS ARE MADE, AND THE PERIOD IN THE
26 LIFE-CYCLE IN WHICH CONFORMITY TO PEER-GROUP
27 NORMS IS GREATEST."
28 AND JUST IN CASE YOU DON'T THINK THAT THIS

0147

1 DOCUMENT HAD ANY RELEVANCE TO ANYTHING, WHAT IT HAD
2 RELEVANCE TO WAS WHETHER OR NOT THEY WERE GOING TO BE ABLE
3 TO RETAIN MARKET SHARE, AND THESE WERE CALCULATIONS AS TO
4 THEIR MARKET SHARE.

5 "THE CORRELATION BETWEEN THE CHANGE IN THE
6 NUMBER OF 15-TO-19 YEAR-OLDS AND THE CHANGE IN
7 MARLBORO MARKET SHARE IS .971 AND SHOWS MARLBORO
8 PEAKING...AND THEN DECLINING."

9 AND THE CONCERN OF THIS LETTER IS THERE'S LESS
10 CHILDREN IN THAT AGE GROUP NOW. "ARE MARLBOROS GOING TO GO
11 DOWN AND WHAT CAN WE DO ABOUT IT?" THIS IS NOT ONE ISOLATED
12 DOCUMENT. AND MR. MORGAN CAN BE EMBARRASSED ALL HE WANTS,
13 BECAUSE HE NEVER SAID "DON'T DO THAT" OR "WE CAN'T SELL TO
14 CHILDREN. WE'RE NOT INTERESTED IN CHILDREN."

15 HERE'S ANOTHER DOCUMENT. BY THE WAY, MR. MORGAN
16 IS CC'D ON THIS ONE, TOO. AND THIS ONE ISN'T FROM MYRON
17 JOHNSTON. MR. MORGAN IS CC'D, ALONG WITH LOTS OF OTHER
18 PEOPLE.

19 AND THEY'RE TALKING ABOUT THE CONTINUING
20 INTEREST -- SOME OF THESE ARE HARD TO READ. AND THEY'RE
21 TALKING ABOUT OPINION RESEARCH BEING DONE AND LOOKING AT 18
22 YEARS AND OVER IN WHICH THEY'VE -- I HAVE TO READ FROM THE
23 DOCUMENT.

24 "18 YEARS AND OVER, 962 MALES AND 1,098 FEMALES
25 IN WHICH THEY ASKED TWO QUESTIONS FOR US." "FOR
26 US," FOR PHILIP MORRIS, BUT PHILIP MORRIS ISN'T
27 INTERESTED.

28 "DO YOU SMOKE CIGARETTES, THAT IS AT

0148

1 LEAST A PACK A WEEK? AND IF YES, ABOUT HOW MANY
2 CIGARETTES DO YOU USUALLY SMOKE PER DAY NOW?"
3 "IN ADDITION, THOSE SAME QUESTIONS WERE ASKED OF
4 A NATIONAL PROBABILITY SAMPLE OF 452 TEENAGERS
5 AGE 12 TO 17."

6 NOW WE'RE DOWN TO 12-YEAR-OLDS. PHILIP MORRIS
7 WANTED TO KNOW, AND THEY WANTED TO KNOW BECAUSE THEY NEEDED
8 TO CALCULATE THEIR MARKET SHARE. AND ISN'T IT COINCIDENTAL
9 THAT THEY JUST HAPPENED TO BE THE NO. 1 SELLING CIGARETTE IN
10 THAT TEENAGE MARKET. JUST COINCIDENCE.

11 AND WHILE WE'RE TALKING ABOUT MARLBORO AND
12 TEENAGERS, AND PATRICIA AS A TEENAGER, WHAT MR. OHLEMAYER
13 SEEMS TO HAVE FORGOTTEN WAS THAT PATRICIA TALKED ABOUT
14 WATCHING TV ALL THE TIME AND TALKED ABOUT HOW THE AIRWAYS
15 WERE FILLED WITH SMOKING COMMERCIALS, AMONG THEM -- AND I
16 SHOWED YOU -- I THINK I SHOWED YOU FIVE OF THEM --
17 MARLBORO. AND IT WAS THE BEGINNING OF WHAT BECAME THE
18 BIGGEST CAMPAIGN EVER, THE BIGGEST ADVERTISING CAMPAIGN
19 EVER.

20 AND IT STARTED OUT AT THE BEGINNING OF THE SHOW
21 WITH RAWHIDE. SHE TESTIFIED THAT THAT WAS A SHOW THAT SHE
22 WATCHED. SHE TESTIFIED THESE WERE THINGS THAT SHE HAD
23 SEEN. AND, OF COURSE, PATRICIA IS AN HONEST PERSON. SHE IS
24 NOT GOING TO SIT HERE AND SAY TO YOU: "YES, I CAN TELL YOU
25 THAT ON JANUARY 22ND, 1961, I SAW THAT MARLBORO AD AND I
REMEMBER IT AND IT'S THE REASON I STARTED SMOKING."

27 INSTEAD, WHAT SHE SAID WAS "THERE WAS A CUTE GUY
28 AT SCHOOL. AND GUESS WHAT? HE LOOKED LIKE THE MARLBORO

0149

1 MAN." AND THAT'S WHAT ATTRACTED HER TO MARLBORO. AND IF
2 YOU LOOK AT THE MARLBORO ADS -- YOU HEARD DR. POLLAY TALK
3 ABOUT THIS, YOU HEARD DR. BENOWITZ TALK ABOUT THIS -- THE
4 ADS APPEAL TO TEENAGERS. NOT BECAUSE THERE'S ANYTHING
5 DIRECT, BUT BECAUSE THIS IS THE TIME PERIOD WHEN TEENAGERS
6 ARE SEEKING INDEPENDENCE. THE MARLBORO MAN IS OUT THERE
7 ALONE. REMEMBER THE TESTIMONY? THERE IS NO SHERIFF IN
8 MARLBORO COUNTRY. THERE'S NO AUTHORITY. AND THAT'S EXACTLY
9 THE APPEAL AND THAT IS SOMETHING ELSE THAT WAS STUDIED.

10 THIS IS ANOTHER ONE OF THOSE REALLY BAD
11 COPIES OF DOCUMENTS. BUT MY GOODNESS, THIS IS DIRECTED TO
12 MR. J.J. MORGAN. I GUESS HE MAY BE EMBARRASSED ABOUT THIS
13 ONE AS WELL. "WHY PEOPLE START TO SMOKE?" AND IT GOES
14 THROUGH A WHOLE ANALYSIS OF WHY TEENS SMOKE AND WHAT ARE THE
15 THINGS THAT APPEAL TO THEM.

16 "MANY BOYS AND GIRLS START TO SMOKE TO SHOW
17 THEIR INDEPENDENCE, AS A SYMBOL OF REVOLT AGAINST
18 AUTHORITY, TO FEEL SOPHISTICATED AND GROWN-UP, TO
19 BE 'ONE OF THE CROWD,' TO GAIN SOCIAL STATUS, TO
20 HAVE SOMETHING TO DO.

21 "THE ADVERTISERS OF CIGARETTES EXPLOIT THIS URGE
22 BY CREATING AN IMAGE OF A SMOKER AS AN
23 OUTSTANDING ATHLETE; A HANDSOME, VIRILE OUTDOOR
24 MAN; A NONCHALANT CAMPUS LEADER; A MAN WHO
25 SUCCEEDS; A SOPHISTICATED, CHARMING YOUNG WOMAN."

26 THEY WEREN'T STUDYING THIS? OF COURSE THEY WERE
27 STUDYING THIS. YOU DON'T HAVE THE MOST SUCCESSFUL
28 ADVERTISING CAMPAIGN EVER BECAUSE YOU DON'T STUDY THE

0150

1 FACTORS. YOU DON'T BECOME THE NO. 1 CIGARETTE BRAND BECAUSE
2 YOU DON'T APPEAL TO TEENAGERS. THAT'S THE ONLY WAY THAT YOU

3 GET STARTERS. STARTERS EQUAL CHILDREN. AND CHILDREN DO NOT
4 MAKE INFORMED CHOICES.

5 AND HAD THAT APPEARED ON THE PACK (INDICATING),
6 THERE'S A GREATLY LIKELIHOOD THAT SOMEBODY WOULD SEE THAT,
7 INSTEAD OF A RED AND WHITE COLOR PACKAGE THAT LOOKS SO NICE,
8 THAT HAS A COWBOY. NOBODY EVER GETS SICK IN MARLBORO
9 COUNTRY EITHER. THAT'S THE KIND OF WARNING THAT WOULD BE
10 PAID ATTENTION TO (INDICATING).

11 AND DID THAT WARNING CAUTION, THIS "MAY BE
12 HAZARDOUS TO YOUR HEALTH," DID IT SAY "THIS CONTAINS
13 AMMONIA, ARSENIC," ALL SORTS OF OTHER THINGS LIKE THAT?

14 LET ME READ TO YOU WHAT THE SURGEON GENERAL
15 SAID. AND MR. OHLEMAYER AGAIN TAKES THINGS OUT OF CONTEXT.
16 "STATISTICS DON'T PROVE ANYTHING. THE SURGEON GENERAL WAS
17 SAYING IT'S NOT PROVED."

18 I'M GOING TO JUST TAKE YOU VERY BRIEFLY -- AND
19 THIS IS PLAINTIFF'S EXHIBIT 86-A THROUGH I. AND THESE ARE
20 EXCERPTS FROM THE SURGEON GENERAL'S REPORT THAT WEREN'T PUT
21 INTO EVIDENCE BY THE DEFENDANT. "CIGARETTE SMOKING IS
22 CAUSALLY RELATED TO LUNG CANCER IN MEN." THAT MUST BE
23 RECENT THAT THEY CAME UP WITH THAT. 1964. YET THEY CHARGE
24 PATRICIA WITH THAT KNOWLEDGE, BUT THEY DON'T HAVE IT. IT'S
25 ONLY STATISTICS. IT'S ONLY STATISTICS.

26 1967. 86-B. THEY TALK FIRST ABOUT THE 1964
27 REPORT AND THEN THEY SAY:

28 "ADDITIONAL EVIDENCE PROVIDES SPECIFIC

0151
1 INFORMATION ON THE INCREASED MORTALITY RATIOS OF
2 FEMALE CIGARETTE SMOKERS."

3 REMEMBER, BACK IN '64, THEY SAID: "WE CAN
4 DEFINITELY SEE IT WITH MEN. IT LOOKS LIKE THAT'S
5 WHAT'S HAPPENING WITH WOMEN. WE'RE NOT SURE YET." BY '67,
6 THEY'RE SURE. THEY'RE SURE.

7 1979. AN ANNIVERSARY DATE. THEY TALK ABOUT THE
8 1964 REPORT. AND THEY TALK ABOUT 15 YEARS AFTER THE
9 ORIGINAL REPORT AND HOW THEY'RE PUBLISHING IT.

10 "THIS BOOK IS MORE THAN A COMPENDIUM OF NEW DATA
11 CONFIRMING THE CONCLUSIONS OF THE ORIGINAL
12 REPORT. FOR THIS DOCUMENT REVEALS, WITH DRAMATIC
13 CLARITY, THAT CIGARETTE SMOKING IS EVEN MORE
14 DANGEROUS - INDEED, FAR MORE DANGEROUS - THAN WAS
15 SUPPOSED IN 1964.

16 "THE NEW REPORT, FOR EXAMPLE, PRESENTS SOBERING
17 INFORMATION ABOUT A SUBJECT NOT EXTENSIVELY
18 TREATED IN THE 1964 REPORT: WOMEN AND SMOKING.
19 AMONG OTHER THINGS, THE EVIDENCE SUGGESTS THAT
20 MOTHERS WHO SMOKE DURING PREGNANCY FACE THE
21 POSSIBILITY OF CREATING LONG-TERM, IRREVERSIBLE
22 EFFECTS ON THEIR BABIES."

23 DO YOU SEE THAT ON THE PACK?

24 "AND AS SMOKING LEVELS AMONG WOMEN GO UP,
25 DISEASE AND DEATH RATES GO UP ALSO: LUNG CANCER
HAS INCREASED FIVEFOLD AMONG WOMEN SINCE 1955.
WOMEN WHO SMOKE LIKE MEN DIE LIKE MEN WHO
SMOKE."

0152
1 BUT THE SURGEON GENERAL GOES ON AND SAYS THIS.
2 AND BY THE WAY, THIS IS THE INTRODUCTION AND IT'S WRITTEN BY
3 JOSEPH A. CALIFANO, WHO USED TO BE HEAD OF THE DEPARTMENT OF
4 HEALTH HERE IN CALIFORNIA AND BECAME THE SECRETARY OF THE
5 DEPARTMENT OF HEALTH EDUCATION AND WELFARE.

6 "THIS DOCUMENT IS SIGNIFICANT FOR ANOTHER
7 REASON. IT DEMOLISHES THE CLAIMS MADE BY
8 CIGARETTE MANUFACTURERS AND A FEW OTHERS 15 YEARS
9 AGO AND TODAY: THAT THE SCIENTIFIC EVIDENCE WAS
10 SKETCHY; THAT NO LINK BETWEEN SMOKING AND CANCER
11 WAS 'PROVEN.' THOSE CLAIMS, EMPTY THEN, ARE
12 UTTERLY VACUOUS NOW. 15 YEARS OF ADDITIONAL
13 RESEARCH OVERWHELMINGLY RATIFY THE ORIGINAL
14 SCIENTIFIC INDICTMENT OF SMOKING AS A CONTRIBUTOR
15 TO DISEASE AND PREMATURE DEATH. INDEED, EVEN THE
16 CIGARETTE INDUSTRY'S OWN RESEARCH FROM JANUARY
17 1964 THROUGH DECEMBER 1973, AT A COST OF
18 APPROXIMATELY \$15 MILLION, CONFIRMED THE LETHAL
19 DANGERS OF CIGARETTE SMOKING. TODAY THERE CAN BE
20 NO DOUBT THAT SMOKING IS TRULY SLOW-MOTION
21 SUICIDE.

22 "IN TRUTH, THE ATTACK UPON THE SCIENTIFIC AND
23 MEDICAL EVIDENCE ABOUT SMOKING IS LITTLE MORE
24 THAN AN ATTACK UPON SCIENCE ITSELF: AN ATTACK
25 UPON THE EPIDEMIOLOGICAL, CLINICAL, AND
26 EXPERIMENTAL RESEARCH DISCIPLINES UPON WHICH
27 THESE CONCLUSIONS ARE BASED. LIKE EVERY ATTACK
28 UPON SCIENCE BY VESTED INTERESTS" -- "VESTED

0153

1 INTERESTS," THE TOBACCO COMPANIES INTERESTED IN
2 CONTINUING PROFITS -- "FROM ARISTOTLE'S DAY TO
3 GALILEO'S TO OUR OWN, THESE ATTACKS COLLAPSE OF
4 THEIR OWN WEIGHT."

5 AND IN THIS SAME REPORT, THE SURGEON GENERAL GOES
6 ON TO TALK ABOUT HOW THEY DON'T KNOW WHAT THE CIGARETTE
7 COMPANIES HAVE ADDED TO CIGARETTES. THEY DON'T KNOW WHAT IT
8 MEANS. THEY DON'T KNOW WHETHER OR NOT THERE'S INTERACTION
9 OR SYNERGY BETWEEN ALL OF THESE THINGS THAT HAVE BEEN ADDED
10 TO TOBACCO. THEY DON'T KNOW WHETHER THERE ARE ANY SAFE
11 LEVELS OF ANY OF THESE THINGS THAT HAVE BEEN ADDED.

12 AND ONE OF THE THINGS THEY SAY IS:

13 "THE SUCCESSFUL MARKETING OF LOW-TAR AND
14 NICOTINE CIGARETTES HAS REQUIRED THE ADDITION OF
15 NUMEROUS FLAVOR ADDITIVES. THE NATURE AND
16 COMPOSITION OF THESE ADDITIVES IS TO SOME EXTENT
17 A PROPRIETARY MATTER."

18 REMEMBER, THAT'S WHAT THEY SAID. "WE CAN'T TELL
19 THE PUBLIC. WE CAN'T EVEN TELL THE PUBLIC HEALTH PEOPLE."

20 DR. DAVIS SAID:

21 "THEY GAVE US A LIST OF 599 THINGS THAT THEY
22 ADD. WE DON'T KNOW HOW MUCH. WE DON'T KNOW IN
23 WHAT QUANTITIES. WE DON'T KNOW IN WHAT
24 COMBINATION. WE HAVE NO IDEA. BUT THAT'S THEIR
25 SECRET."

26 "NEVERTHELESS, WE DO NOT KNOW WHETHER THESE
27 UNDISCLOSED ADDITIVES ARE THEMSELVES HARMLESS."
28 HAVE THEY EVER TESTED THAT? NO, THEY HAVEN'T. I

0154

1 DIDN'T READ YOU ANYTHING OUT OF CONTEXT. I READ YOU THE
2 THREE THINGS FROM THAT LETTER, THE RESEARCH THAT WAS TO BE
3 AVOIDED, RESEARCH THAT RELATED TO HUMANS AND DISEASE.
4 THAT'S WHAT THEY WANTED TO AVOID.

5 AND WHEN YOU TALK ABOUT KNOWLEDGE AND PUBLIC
6 KNOWLEDGE AND THE READER'S DIGEST AND ALL OF THESE THINGS,
7 THIS IS FROM THE 1989 SURGEON GENERAL'S REPORT. AND WHAT IT
8 IS, IT SHOWS CIGARETTE CONSUMPTION AND IT SHOWS THE EFFECTS

9 OF MAJOR SMOKING AND HEALTH EVENTS. AND WHAT IT SHOWS YOU
10 IS HERE'S THE DEPRESSION (INDICATING), THE GREAT DEPRESSION
11 AND THERE WAS A SLUMP THERE. PEOPLE COULDN'T AFFORD IT.
12 AND THEN THIS INCREDIBLE RISE UNTIL WE GET TO WORLD WAR II.
13 AND THEN THE RISE GOES UP EVEN MORE.

14 NOW, THAT FIRST BUMP HERE (INDICATING), WHAT DO
15 WE HAVE THERE? THAT FIRST BUMP, THAT'S THE WYNDER, THAT'S
16 THE HILL, THAT'S THE STUFF THAT'S COMING OUT. THAT'S THE
17 CANCER SCARE. AND YES. LOOK WHAT HAPPENS? THERE'S A DROP.

18 BUT REMEMBER THE ROSY OUTLOOK? WELL, THE ROSY
19 OUTLOOK WAS RIGHT, BECAUSE LOOK WHAT HAPPENS (INDICATING).
20 CONSUMPTION GOES UP AGAIN. WE'VE GOT ANOTHER LITTLE BUMP
21 THERE. AND LOOK AT THE DROP? THAT'S THE 1964 SURGEON
22 GENERAL'S REPORT. THAT'S HOW EFFECTIVE THE HEALTH
23 COMMUNITY'S MESSAGES ABOUT THE '64 REPORT WERE. IT BARELY
24 DROPPED AT ALL.

25 AND YES, THERE HAVE BEEN THINGS ALONG THE WAY.
26 AND ONE OF THE BIGGER DROPS, INTERESTINGLY ENOUGH, IS THE
27 FACT THAT TV ADVERTISING WAS TAKEN OFF. CIGARETTE
28 ADVERTISING WAS TAKEN OFF. AND YOU KNOW WHY IT WAS TAKEN

0155
1 OFF? BECAUSE THEY CAME UP WITH THIS THING CALLED THE
2 FAIRNESS DOCTRINE.

3 THERE WAS SO MUCH CIGARETTE ADVERTISING ON TV,
4 AND ALL OF A SUDDEN THEY WERE BEING TOLD THAT: "WE HAVE TO
5 GIVE EQUAL TIME TO HEALTH MESSAGES." WELL, EQUAL TIME TO
6 HEALTH MESSAGES MIGHT HAVE A BIG EFFECT. SO INSTEAD,
7 CIGARETTE COMPANIES PULLED THEIR ADVERTISING OFF TV.

8 THE COURT: MS. CHABER, YOU ASKED FOR THIS
9 FIVE-MINUTE ADVICE. THAT IS WHERE WE ARE NOW.

10 MS. CHABER: OKAY.

11 AND THAT CONTINUED. AND IT IS GOING DOWN
12 (INDICATING). AND YES, WE'RE GAINING MORE AND MORE AND MORE
13 INFORMATION. AND YES, THERE IS MORE PUBLIC FUNDS BEING
14 EXPENDED TO TRY TO EDUCATE PEOPLE.

15 BUT WHERE IS THE EDUCATION FROM PHILIP MORRIS?
16 WHERE IS THE ACKNOWLEDGMENT FROM THEM? THEY STAND HERE AND
17 THEY SAY: "OH, IT'S RISKY. WE DON'T KNOW. WE DON'T KNOW
18 ALL OF THIS." BUT SHE IS SUPPOSED TO KNOW. AND THEY HOLD
19 HER RESPONSIBLE.

20 SINCE TIME IS SHORT, THE OTHER THING I WANTED TO
21 TALK TO YOU ABOUT WAS THIS ISSUE OF DIAGNOSIS. YOU KNOW,
22 THE EASIEST THING FOR YOU FOLKS TO DO IS TO SAY: "NOT A
23 LUNG CANCER. WE NEVER HAVE TO DECIDE THE HARD ISSUES." SAY
24 NO ON THAT AND YOU GO HOME. AND IF YOU REALLY BELIEVE THAT,
25 LADIES AND GENTLEMEN, DO THAT.

26 WE BROUGHT YOU PULMONOLOGISTS, PEOPLE WHO
27 SPECIALIZE IN LUNG DISEASE, DR. HORN, DR. FEINGOLD. WE
28 BROUGHT YOU DR. HAMMAR. DR. HAMMAR, WHO EVERYONE

0156
1 ACKNOWLEDGES IS ONE OF THE WORLD'S EXPERTS. AND THEY ALL
2 SAY THE SAME THING. THEY SAY THIS IS A LUNG CANCER. LUNG
3 CANCER. THE TYPE IS SMALL CELL. IT'S NOT THE MOST COMMON
4 PRESENTATION.

5 BUT, YOU KNOW, MR. OHLEMAYER SAID: "NO
6 STATISTICS." BUT THEN HE STARTED SAYING: "WELL, 90 PERCENT
7 OF LUNG CANCERS, YOU CAN FIND THE TUMOR." WELL, WHAT ABOUT
8 THAT OTHER 10 PERCENT?

9 REMEMBER THE NUMBERS THAT DR. DAVIS GAVE US?
10 180,000 LUNG CANCER DEATHS EVER YEAR, 25 PERCENT OF THEM
11 SMALL CELL LUNG CANCER. THAT'S 45,000 SMALL CELL LUNG

12 CANCER DEATHS EVERY YEAR. IF YOU TAKE THE UNUSUAL CASE, THE
13 10 PERCENT OR THE 5 PERCENT, YOU HAVE 4,500. 4,500 SMALL
14 CELL LUNG CANCERS THAT DON'T FIT THE CLASSIC PATTERN.

15 AND THEN YOU WANT TO TAKE THIS THYMIC CANCER THAT
16 NO ONE -- NO ONE OTHER THAN PEOPLE HIRED BY THESE DEFENDANTS
17 CAME INTO THIS COURTROOM TO SAY WAS EVER A CONSIDERATION.
18 AND THERE'S LESS THAN 200 IN ALL THE YEARS OF REPORTING.

19 AND YOU WANT TO TALK ABOUT FANCY AND PICTURES.
20 AND YOU'VE GOT THIS NICE OVERLAY AND HERE IS THIS HUGE
21 THYMIC GLAND. IT'S HUGE (INDICATING). WHERE IS IT? WHERE
22 WAS IT ON THE X-RAYS?

23 MR. OHLEMAYER SAYS: "WELL, IT DOESN'T HAVE TO BE
24 THERE TO HAVE HAD THE CANCER START THERE." THAT'S FUNNY.
25 HE SAID IT HAD TO BE THERE IN ORDER FOR THE CANCER TO HAVE
26 STARTED AS A LUNG CANCER. AND THAT'S WHAT IT DID. LUNG
27 CANCERS CAN START IN THE BRONCHIAL TUBE. NOT OBVIOUSLY IN
28 THE INSIDE SURFACE, BUT JUST UNDERNEATH THAT. THAT'S WHAT

0157
1 DR. HAGEN TOLD YOU. THAT'S WHAT DR. MENA TOLD YOU. ONE
2 WITNESS WORTHY OF BELIEF IS ENOUGH FOR YOU TO DECIDE
3 CAUSATION.

4 AND THE CAUSATION ISSUE IS MORE LIKELY THAN NOT.
5 YOU DON'T HAVE TO WALK OUT OF HERE 100 PERCENT CERTAIN, 90
6 PERCENT CERTAIN, 80 PERCENT CERTAIN OR ANYTHING NEAR THAT.
7 ONE WITNESS. I SUGGEST TO YOU DR. MENA IS THAT WITNESS. I
8 SUGGEST TO YOU DR. HAGEN IS THAT WITNESS. ALL OF THESE NICE
9 BIG BOARDS THAT WERE BLOWN UP (INDICATING), THEY CONSIDERED
10 ALL THOSE THINGS.

11 ARE THESE SUCH TERRIBLE DOCTORS THAT THEY READ
12 THESE THINGS AND THEN THEY MAKE DECISIONS THAT ARE SO
13 WRONG? I THINK YOUR ANSWER TO THAT QUESTION WILL BE NO.
14 THESE ARE DOCTORS -- EVEN DR. RYMER SAID: "I'D GO TO DR.
15 MENA. HE'D BE MY DOCTOR." WHY? BECAUSE HE DOESN'T KNOW
16 WHAT HE'S DOING? BECAUSE HE DOESN'T KNOW HOW TO READ X-RAYS
17 AND REPORTS AND PATHOLOGY AND WHATEVER?

18 THIS IS A LUNG CANCER. AND THE REASON THEY DON'T
19 WANT YOU TO BELIEVE IT'S A LUNG CANCER IS BECAUSE IF YOU
20 BELIEVE IT'S A LUNG CANCER, YOU HAVE TO REACH THE CONCLUSION
21 THAT IT WAS CAUSED BY SMOKING.

22 THE COURT: MS. CHABER, I'M GOING TO HAVE TO BE
23 FAIR TO EVERYBODY AND ENFORCE THE ARRANGEMENT ON TIME AND
24 YOUR TIME IS UP.

25 MS. CHABER: AND I THANK YOU, LADIES AND
26 GENTLEMEN, BECAUSE I THINK THAT IS WHAT YOU WILL FIND AND
27 FIND AGAINST PHILIP MORRIS.

28 THE COURT: OKAY. JURORS, I'M GOING TO RECESS

0158
1 FOR THE EVENING AND GIVE YOU THE CONCLUDING INSTRUCTIONS
2 FIRST THING TOMORROW MORNING.

3 IT IS ABSOLUTELY CRITICAL THAT YOU CONTINUE TO
4 FOLLOW THE ADMONITION OVER THE COURSE OF THIS EVENING. SO
5 PLEASE DO NOT DISCUSS ANY ASPECT OF THIS CASE WITH ANYONE,
6 DON'T LET ANYONE DISCUSS IT WITH YOU. AND PLEASE DO NOT
7 FORM OR EXPRESS ANY OPINIONS ABOUT THIS CASE.

8 WE'RE GOING TO RESUME TOMORROW AT 9:30 IN THE
9 MORNING. SO HAVE A GOOD EVENING, AND WE'LL SEE YOU SHARPLY
10 AT 9:30. HAVE A GOOD EVENING.

11 (THE PROCEEDINGS ADJOURNED AT 5:00 P.M.)
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